

Flawed Logic and Shallow Utilitarianism: Torture and the Ticking Bomb Scenario

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Bachelor of Arts

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Declaration

I declare that this thesis is true account of my own work, unless otherwise indicated, and has not previously been submitted for examination at Murdoch University or any other institution.

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Abstract

The debate over the efficacy of torture is ongoing. When faced with an emergency situation, such as a bomb about to explode in a densely populated area, should the state resort to torture if the suspect in custody refuses to divulge any information? Should democratic governments allow for the use of interrogational torture as a last resort? Does torture in emergency situations have the potential to maximise human rights and the well-being of the community? These are some of the important questions addressed in the thesis.

Some of the proponents claim that it can be morally justified, and that the use of torture could maximise the liberty of the citizens of the nation. However, torture is not a maximisation of liberty. It does not improve the common good. Torture cannot be justified by any government – morally or otherwise. I will consider the practical and moral arguments made by Dershowitz, Bagaric and Clarke. I will argue torture cannot be justified because of the problems with the ticking bomb scenario and the serious societal effects torture has. I will then consider the impact of interrogational torture on human rights and argue that it is an absolute violation of liberty. Finally, I will argue that the torture proponents' arguments that are centred on utilitarianism are shallow and are a misapplication of utilitarian theory.

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Chapter One: Introduction

1.1. Introduction

The evil scientist Dr. Pernicious has announced that there is a nuclear device located somewhere in the Perth metropolitan area, ready to explode in one hour. Little did Pernicious know, a Western Australian SWAT team was able to find out where his Kalgoorlie lair was, and capture who they believe to be Dr. Pernicious and some of his alleged mercenaries of destruction. There is only an hour to go until the device is set to explode, and no one in custody is willing to give the location of the device, so the question is; how does the interrogator extract the information quickly enough to save the Perth metropolitan area? Is torture the best, or even a realistic option?

There has been much debate over time as to whether torture can be justified in democratic regimes, with both sides making empirical, theoretical and moral arguments that cannot be taken lightly. Torture cuts deeply into ones most important values and concerns,¹ and can represent one of the most abhorrent attacks on human dignity imaginable,² so the potential use of interrogational torture must be met with caution. Throughout history, torture has been used to create fear and

¹ Claudia Card, "Ticking Bombs and Interrogation" *Criminal law and philosophy* 2 (2007), 8. doi 10.1007/s11572-007-9306-z

² John Kleinig, "Ticking Bombs and Torture Warrants." *Deakin Law Review* 10, no.2 (2005): 619.
AGIS Plus Text

control people,³ eliminate political opponents⁴ and terrorise a nation's own citizens (during war and peace time).⁵ However, the scope of my thesis will be limited to whether interrogational torture can be justified in democratic regimes. When one is discussing whether torture can be justified in the democratic world, it is important not to be dogmatic and completely dismiss the thought. So I will be providing both sides of the argument with the ultimate goal of saying that torture should not be justified in the democratic world.

The focus of my thesis is not the definition of torture or torture in general, but of torture in emergency situations; namely the ticking bomb scenario. Torture can be used as a technique for war or to scare the population, but the focus here will be whether torture should be used by governments who are facing a situation such as the Dr. Pernicious example that I gave above.

1. 2. The Ticking Bomb Scenario

At the beginning of this introduction I gave an example of a scenario where an evil scientist, Dr. Pernicious has planted a nuclear device somewhere in Perth. Luckily for the people of Perth, Dr. Pernicious has been captured and there is about an hour for the bomb to be discovered and disarmed. This is an example of a 'ticking bomb scenario' that is used by supporters of interrogational torture to justify the use of torture. Most ticking bomb scenarios follow the pattern that there is a potentially

³ David Hope, "Torture." *The International and Comparative Law Quarterly* 53, no.4 (2004): 808. Cambridge Online Journals

⁴ Ruth Blakeley, "Why Torture?" *Review of International Studies* 33, no.3 (2007): 382. doi: 10.1017/S0260210501007565

⁵ Susan Opatow, "Moral Exclusion and Torture: The Ticking Bomb Scenario and the Slippery Ethical Slope" *Journal of Peace Psychology* 13, no.4 (2007): 459. doi: 10.1080/10781910701727343

catastrophic event, such as Dr. Pernicious' nuclear device in the city, and in order to avert the deaths of thousands of people, should torture be used to extract the information from a suspect who is unwilling to provide the information. In regard to the ticking bomb scenario, Card notes that in general:

The danger is imminent, the potential disaster great, potential victims innocent, helpless and numerous, and the suspect uncooperative.⁶

Card and Matthews note that the essential elements in justifying torture in the ticking bomb scenario are urgency, relative mercifulness, last resort, self defence,⁷ threat and necessity.⁸ Supporters for the use of torture in these hypothetical situations argue that an absolute prohibition on the use of torture is irresponsible because the lives of many being on the line, how could anyone justify not trying every means necessary to avoid disaster?⁹ Bagaric and Clarke argue that torture can be used as an interrogation technique by using this formula: “(1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information.”¹⁰ They argue that the harm inflicted upon the victim of torture must be substantially outweighed by the prevention of harm that the torture could potentially provide.¹¹ They argue that if there are other means of acquiring the information then they must be used first, as

⁶ Card, 'Ticking Bombs and Interrogations', 3

⁷ Card, "Ticking Bombs and Interrogation," 11

⁸ Richard Matthews, *An Absolute Violation: Why Torture Must be Prohibited* (Canada: McGill-Queens University Press, 2008), 73

⁹ Gordon Marino, "Justifying Torture Why the Israelis are wrong" *Commonweal* 124, no.11 (1997), 9. *General Onefile*

¹⁰ Mirko Bagaric and Julie Clarke, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable." *University of San Francisco Law Review* 39, no.3 (2005): 611. HeinOnline

¹¹ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 611

they believe torture can only be used as a last resort.¹² Bagaric and Clarke believe that torture can also only be justified if the interrogator is absolutely sure that the suspect has the requisite knowledge of the potentially catastrophic event.¹³

Supporters of interrogational torture base its effectiveness on the human desire to avoid pain.¹⁴ Some proponents of interrogational torture argue that there is a moral obligation to torture the suspect in emergency situations, saying that the pain inflicted upon one person is outweighed by the suffering that will be inflicted upon society if the catastrophic event occurs.¹⁵ Even though she is opposed to the use of torture, Card notes that the arguments mounted by supporters of interrogational torture and the ticking bomb scenario are seductive.¹⁶

Even with only a brief statement of what the ticking bomb scenario is, one could be seduced into the belief that interrogational torture can be justified (even though it might seem to be a fanciful situation) by appealing to the simplistic utilitarian morality that one could succumb to. With reference to my ticking bomb scenario involving Dr. Pernicious' nuclear device in Perth, the ticking bomb scenario will be the basis for most of the arguments both for and against that I will explain throughout the thesis.

¹² Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 611

¹³ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 612

¹⁴ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 588

¹⁵ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 70

¹⁶ Card, 'Ticking Bombs and Interrogations', 11

1. 3. Defining Torture

Article One of the UN's *Convention Against Torture* (CAT) defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity.¹⁷

It is the absolute prohibition of torture at international law that provides for serious debate over the definition. Nations and scholars argue over how far physical or non-physical pain and/or suffering need to be inflicted in order to distinguish between torture and 'cruel, inhuman or degrading' conduct.¹⁸ The separation between the two comes from the definition in CAT where the ban on torture is absolute, but there is only an obligation to try to prevent the infliction of cruel, inhuman or degrading conduct.¹⁹ Other documents in international law such as the *International Covenant on Civil and Political Rights* do not make this distinction between torture and cruel, inhuman or degrading conduct as both are absolutely prohibited.²⁰

Torture is absolutely prohibited at international law²¹, and no nation is permitted to violate this absolute prohibition. The absolute prohibition applies to all nations,

¹⁷ Human Rights Web, *UN Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 16 July 1994. <http://www.hrweb.org/legal/cat.html>, article 1

¹⁸ Hernan Reyes, "The worst scars are in the mind: psychological torture." *International Review of the Red Cross* 89, no. 867 (2007): 593. doi 10.1017/S1816383107001300

¹⁹ Reyes, "The worst scars are in the mind: psychological torture", 593

²⁰ Reyes, "The worst scars are in the mind: psychological torture", 593

²¹ Steven Ratner, Jason Abrams and James Bischoff. *Accountability for Human Rights Atrocities in International Law* (Oxford, Oxford University Press, 2009), 121

whether or not they have signed or ratified one of the various treaties concerning torture.²² There are no exceptions to this prohibition, including war (transnational or civil) or a public emergency.²³

It is beyond the focus of my thesis to go further into a debate as to whether differing acts that have the potential to cause ‘severe pain or suffering’ actually reach that threshold outside of the introduction. Whether an act has sufficient intensity to reach the threshold of severe pain or suffering is subjective, with some arguing that there needs to be a realistic chance of organ failure, severe weakening of bodily function or fatality to reach the threshold.²⁴ This can be used by states to justify lowering the threshold for what constitutes severe pain or suffering, effectively ruling out non-physical and psychological forms of torture.²⁵ There is evidence that non-physical acts such as waterboarding (simulated drowning) do cause severe psychological turmoil which is why it has been classified by the Council of Europe as torture.²⁶ In the case of acts such as waterboarding, there is a realistic chance that the victim could die during or after the act has been committed.²⁷

Both physical and non-physical acts will be considered torture for the purposes of my thesis. Examples of physical coercion include Israeli security forces beating Palestinian men, and breaking the limbs of young Palestinian men from the same

²² Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 586

²³ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 587

²⁴ Reyes, “The worst scars are in the mind: psychological torture”, 597

²⁵ Reyes, “The worst scars are in the mind: psychological torture”, 602

²⁶ Reyes, “The worst scars are in the mind: psychological torture”, 604

²⁷ Card, ‘Ticking Bombs and Interrogations’, 8

village after they had been led into large fields.²⁸ Psychological torture can interfere with the senses and personality of the victim, but will not leave any lasting physical damage.²⁹ Psychological examples include depriving the victim of sleep, using their own sense of fatality against them and exposing the victim to extreme weather conditions.³⁰

What is important to know about what torture is, and what it does for the purposes of my thesis is that the definition has three important elements to it: intent, pain/suffering and purpose.³¹ For the purposes of my thesis, if an act of cruelty used as an interrogation technique fits within these elements, then it will be considered torture. Torture breaks people by cutting deeply into their most valued ideals and concerns by abusing the power relationship between the torturer (who has all the power), and the torture victim (who is essentially defenceless).³² Opatow points out the contradiction that people in democratic nations are disgusted by what the Nazis did (in general) during their reign, but can try to justify torture.³³ Opatow's point is invaluable because torture victims are humiliated in ways that dehumanise them, so much so that Wolfendale notes how sometimes the screams of torture victims stop sounding human.³⁴ Torture is a perversion;³⁵ the torturer does not have to just beat the victim or stick needles into her or his fingertips, the torturer need simply to

²⁸ Marino, "Justifying Torture Why the Israelis are wrong", 9

²⁹ Reyes, "The worst scars are in the mind: psychological torture," 598

³⁰ Reyes, "The worst scars are in the mind: psychological torture," 598

³¹ Card, 'Ticking Bombs and Interrogations', 7

³² Card, 'Ticking Bombs and Interrogations', 10

³³ Opatow, 'Moral Exclusion and Torture: The Ticking Bomb Scenario and the Slippery Ethical Slope', 459

³⁴ Jessica Wolfendale, "Training Torturers: A Critique of the 'Ticking Bomb' Argument." *Social Theory and Practice* 32, no.2 (2006): 281. Academic Onefile.

³⁵ Kleinig, "Ticking Bombs and Torture Warrants.", 619

humiliate and degrade the victim³⁶ by taking something most sacred to them, like a religious belief, and turn it against them when they are most defenceless.³⁷

1.4. Perpetrators of Torture

The reason why we must ask the question whether torture can be justified is that torture does not only occur in authoritarian regimes, with documented cases arising in (but not limited to) the United States, Canada, France and Germany.³⁸ One of the well-documented cases involving the United States was the humiliation suffered by prisoners at Abu Ghraib prison in Iraq. Investigation by United States television uncovered sexual and physical humiliation of prisoners at Abu Ghraib, where the prisoners were abused with acts such as forced masturbation, had fear induced with the use of dogs, men being forced into naked pyramids and forced into stress positions while being threatened with electrocution.³⁹ It was reported that orders for the ill-treatment of prisoners came from higher in the command chain so the suspects could be ‘softened’.⁴⁰

Western Nations have been accused in recent history of using the concept of ‘extraordinary rendition.’ This is a situation where prisoners are sent to be interrogated in a nation where the laws dealing with interrogations are more ‘relaxed’.⁴¹ The United States allegedly had secret facilities in Asia and the Middle

³⁶ Kleinig, “Ticking Bombs and Torture Warrants.”, 619

³⁷ Kleinig, “Ticking Bombs and Torture Warrants.”, 620

³⁸ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 590

³⁹ Amann, “Abu Ghraib”, 2093

⁴⁰ Diane Marie Amann, “Abu Ghraib” *University of Pennsylvania Law Review* 153, no.6 (2005): 2091. doi: 10.2307/j100396

⁴¹ Louise Arimatsu, “Outsourcing Torture” *The World Today* 61, no.11 (2005): 17. Proquest.

East,⁴² and there have been documented cases of prisoners being sent to nations such as Egypt and Syria by the United States, where the prisoners have had their limbs broken and subjected to electrocution.⁴³ Former US Attorney General Alberto Gonzales has noted that when this technique is employed, they will have no control over the treatment of the suspect once they have arrived in the new nation.⁴⁴ This complements the experience of nations such as Canada and Britain who have sent prisoners to other nations who have been placed in ‘high risk situations’, even though they had been given assurances about the humane treatment of the prisoner.⁴⁵ The fact that this behaviour may not be occurring under Obama’s presidency is no reason to stop researching in this area because there is always the potential that it can happen again.

1.5. Structure of the thesis

Chapter two of my thesis will provide the arguments for the use of torture as an interrogation technique in emergency situations. This generally follows a utilitarian framework that torture is justifiable because the pain caused to the victim of torture will be far outweighed by the increase in well being of the thousands of people who could have been victims in a potentially catastrophic event.⁴⁶ The arguments for the use of torture in emergency situations are superficially convincing if they are not explored deeply, so it is important to read them with caution.

⁴² Arimatsu, “Outsourcing Torture”, 16

⁴³ Arimatsu, “Outsourcing Torture”, 16

⁴⁴ Arimatsu, “Outsourcing Torture”, 18

⁴⁵ Arimatsu, “Outsourcing Torture”, 17

⁴⁶ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 605

Chapter three is the beginning of the critique of the support of interrogational torture. The chapter will focus on why torture does not work, what effects torture has on the victim, the torturer and society. The most important part of the chapter will be my explanation of what the problems are with the ticking bomb scenario.

Chapter four will focus on the human rights arguments against the use of torture as an interrogation technique. I will focus on the concept of liberty and how the use of torture as an interrogation technique in emergency situations can never maximise the liberty of the people. It will also be important to note how the international community has strongly rejected the use of torture, so much so that it has become part of customary international law.

Chapter Five will provide the principle focus of my critique of the support for the use of interrogational torture by arguing that the utilitarian basis used by the supporters of the use of interrogational torture is a fundamental misunderstanding of utilitarianism. I will be arguing that the torture proponents have misapplied utilitarianism as they try to use an act utilitarian calculus, but they have included rules within their act utilitarian calculus, which essentially voids the formula. In addition, there are too many variables to take into account, so no act utilitarian calculation will be sufficient. While I will provide sufficient evidence in chapters two and three to discredit supporters of interrogational torture, this chapter is imperative because I aim to show that even though there is enough evidence to suggest supporters of interrogational torture are wrong, they were fighting a losing battle from the start because they did not get their arguments right in the first place.

Chapter Two: Arguments for the use of torture as an interrogation technique

2.1. Introduction

In order to critique the use of torture as an interrogation technique, it is important to explore arguments used by the proponents of the ticking bomb scenario to justify the use of interrogational torture. Neil James notes that there are essentially two lines of argument used by supporters of the ticking bomb argument.⁴⁷ The first part of the chapter will explore the arguments put forward by Alan Dershowitz, who argues that, because torture is already in use and during a major emergency will probably be invoked, non-lethal torture should be legalised in order to keep the use of torture open and accountable.⁴⁸ The second part of the chapter will explore the second major argument most recently articulated by Mirko Bagaric and Julie Clarke. Bagaric and Clarke argue that torture should be used as a legitimate interrogation technique, and that there is a rational calculation that should be followed in order to decide when interrogational torture should be used.⁴⁹

⁴⁷ Neil James, "Torture: What is it, Will it Work and Can it be Justified?" in *Law and Liberty in the War on Terror*, ed. Andrew Lynch, Edwina MacDonald and George Williams (Sydney: The Federation Press, 2007), 157

⁴⁸ James, "Torture: What is it, Will it Work and Can it be Justified?", 157

⁴⁹ James, "Torture: What is it, Will it Work and Can it be Justified?", 157

2.2. Dershowitz and the torture warrant

Alan Dershowitz is an American professor at Harvard University.⁵⁰ Dershowitz's support for the use of interrogational torture comes from his belief that legalising non-lethal torture in democratic regimes will promote accountability and regulation.⁵¹ While being morally opposed to torture⁵², Dershowitz argues that because we know that torture is already employed around the world, it is better to regulate it, as opposed to tolerating what is currently illegal behaviour.⁵³

Dershowitz argues that one of the fundamental tenets of democracy is freedom of choice, and democratic governments need to be able to provide the infrastructure and mechanisms for the promotion of choice.⁵⁴ Dershowitz notes that allowing this choice that creates a more accountable system will maximise civil liberties in a world where torture is being driven underground and away from accountability.⁵⁵ Dershowitz believes that the decision to torture is choosing an evil,⁵⁶ but that when faced with a situation like the ticking bomb scenario, sometimes one must choose the 'lesser' of two evils.⁵⁷

Dershowitz bases his arguments for torture on the ticking bomb scenario, which he compares to a train engineer who must make a tragic choice because the brakes on the train have failed. Does the engineer keep the train on course and crash into a bus

⁵⁰ Sarah Joseph, "Torture: The Fallacy of the Ticking Bomb", in *Law and Liberty in the War on Terror*, ed. Andrew Lynch, Edwina MacDonald and George Williams (Sydney: The Federation Press, 2007), 149

⁵¹ Joseph, "Torture: The Fallacy of the Ticking Bomb", 149

⁵² Card, "Ticking Bombs and Interrogation", 3

⁵³ Joseph, "Torture: The Fallacy of the Ticking Bomb", 149

⁵⁴ Alan M. Dershowitz, *Why Terrorism Works* (New Haven: Yale University Press, 2002), 134

⁵⁵ Dershowitz, *Why Terrorism Works*, 141

⁵⁶ Dershowitz, *Why Terrorism Works*, 134

⁵⁷ Bob Brecher, *Torture and the Ticking Bomb* (Oxford: Blackwell Publishing, 2007), 14

full of children, or does he swerve and run over a drunk lying on the tracks?⁵⁸

Dershowitz's students must make the tragic choice; they cannot find a middle ground or a way around the choice.⁵⁹ This is in essence the dilemma of the ticking bomb scenario. In my example, do the police torture Dr. Pernicious in a non-lethal way to try and save Perth from destruction? Dershowitz writes that even though people do not want torture to work, and that it is a tragic choice that one has to make, it is simply because torture sometimes works that the option to torture someone for interrogational purposes must be available.⁶⁰

Torture sometimes works

Much of the basis for Dershowitz's argument is that torture sometimes works. Dershowitz notes that it is a 'tragic' reality that torture sometimes works as an interrogation technique.⁶¹ In his opinion, this is why torture is still used around the world and has not been eliminated totally in any nation,⁶² and that many signatories to the *Convention Against Torture* ignore their obligations.⁶³ Dershowitz uses the example of torture in the Philippines where a suspect was tortured for sixty-seven days. The suspect was eventually given up to the United States after giving the authorities what is referred to as 'lifesaving information.'⁶⁴ Dershowitz believes that the argument that torture should be absolutely prohibited is just an excuse to avoid a tough choice, and that it is the potential that torture has to foil terrorist plots that gives the proponents of torture credibility.⁶⁵ Israel is also used as

⁵⁸ Dershowitz, *Why Terrorism Works*, 132

⁵⁹ Dershowitz, *Why Terrorism Works*, 133

⁶⁰ Dershowitz, *Why Terrorism Works*, 137

⁶¹ Dershowitz, *Why Terrorism Works*, 137

⁶² Dershowitz, *Why Terrorism Works*, 138

⁶³ Dershowitz, *Why Terrorism Works*, 136

⁶⁴ Dershowitz, *Why Terrorism Works*, 137

⁶⁵ Dershowitz, *Why Terrorism Works*, 137

an example of how ‘moderate physical pressure’ was used as an interrogation technique, and that the leads gained from this type of interrogation undoubtedly prevented future terrorist activity.⁶⁶ In regards to Israel, Dershowitz notes that:

In Israel, the use of torture to prevent terrorism was not hypothetical; it was very real and recurring. I soon discovered that virtually no one was willing to take the “purist” position against torture in the ticking bomb case: namely, that the ticking bomb must be permitted to explode and kill dozens of civilians, even if this disaster could be prevented by subjecting the captured terrorist to nonlethal torture and forcing him to disclose its location.⁶⁷

Dershowitz admits that the ticking bomb scenario is a hypothetical that would be a rare occurrence in the real world,⁶⁸ but argues that there is a strong case to allow for interrogational torture in these rare situations.⁶⁹ He notes that allowing for judicially approved, non-lethal, legal interrogational torture has the goal of *reducing* the amount of torture used around the world, because as it has been legalised, the torture will only be used in these rare situations.⁷⁰ Despite arguing that torture works, Dershowitz notes that larger nations like the United States cannot blindly follow what Israel and other smaller nations have done.⁷¹ The actions of the United States will influence and change international law, so while the debate in nations like Israel adds weight to the positive case for interrogational torture, the debate throughout the western world will have far more dramatic consequences.⁷²

⁶⁶ Dershowitz, *Why Terrorism Works*, 139-140

⁶⁷ Dershowitz, *Why Terrorism Works*, 140

⁶⁸ Dershowitz, *Why Terrorism Works*, 140

⁶⁹ Dershowitz, *Why Terrorism Works*, 141

⁷⁰ Dershowitz, *Why Terrorism Works*, 141

⁷¹ Dershowitz, *Why Terrorism Works*, 142

⁷² Dershowitz, *Why Terrorism Works*, 142

Torture is the lesser of two evils

Dershowitz cites Bentham's act utilitarian calculus as part of his justification for his position on interrogational torture.⁷³ The cost-benefit analysis for using torture as an interrogation technique is simple: because torture sometimes works, one can justify torturing a 'guilty' person to save the lives of many innocent people.⁷⁴ Dershowitz argues that the pain and violation of bodily integrity of one person is outweighed by the certain death of many innocent people.⁷⁵ It is impossible to evacuate an entire city in a short amount of time, everything else has been tried, and even though there is no guarantee that torture will work, it should be tried.⁷⁶ Richard Matthews summarises the argument by saying:

...for how could we justify a decision to refrain from torture when we know that such a decision makes it inevitable that many people will die, be injured, and suffer economic loss or an of the other consequences of exploding bombs?⁷⁷

Dershowitz admits that this is a simple form of cost-benefit analysis, and that unless there are limits imposed upon the use of interrogational torture, it could lead down a slippery slope towards tyranny.⁷⁸ Dershowitz argues that this slippery slope is not a fatal blow to the arguments for using interrogational torture; it is simply a warning about what can go wrong if the rules are not properly followed.⁷⁹ Dershowitz believes that in western society it seems that pain is overrated, while death is underrated. The pain of non-lethal torture, such as a sterile needle driven under someone's fingernail is only temporary,⁸⁰ yet it could save the lives of many people.

⁷³ Dershowitz, *Why Terrorism Works*, 146

⁷⁴ Dershowitz, *Why Terrorism Works*, 143

⁷⁵ Dershowitz, *Why Terrorism Works*, 143

⁷⁶ Dershowitz, *Why Terrorism Works*, 143

⁷⁷ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 70

⁷⁸ Dershowitz, *Why Terrorism Works*, 146

⁷⁹ Dershowitz, *Why Terrorism Works*, 147

⁸⁰ Dershowitz, *Why Terrorism Works*, 149

If Dr. Pernicious refuses to give up the location of the bomb, and Perth cannot be evacuated in time, Dershowitz would argue that the benefit of non-lethal torture will outweigh the non-permanent pain caused to Dr. Pernicious.

Dershowitz writes that he has generally received great support for his arguments for the use of interrogational torture during public appearances.⁸¹ Hypotheticals centred on the September 11 attacks in the United States lead Dershowitz to make the point that:

...if the preventable act of terrorism was of the magnitude of the attacks of September 11, there would be a great outcry in any democracy that had deliberately refused to take available preventative action, even if it required the use of torture.⁸²

Dershowitz's arguments here essentially come back to his argument about choice in a democratic nation. He has confined his arguments to the ticking bomb scenario, which is an extreme situation⁸³, with the possibility that the ticking bomb scenarios only use could be as a thought experiment.⁸⁴ As Dershowitz believes he has shown that torture can be justified on the basis of a cost-benefit analysis using the ticking bomb scenario, the idea of 'choice' progresses to whether nations should continue to turn a blind eye to interrogational torture continuing illegally and 'under the radar'⁸⁵ or whether it is time to open the possibility of legal torture that would follow procedure and be recognised by the legal system.⁸⁶

⁸¹ Dershowitz, *Why Terrorism Works*, 150

⁸² Dershowitz, *Why Terrorism Works*, 150

⁸³ Card, "Ticking Bombs and Interrogation", 4

⁸⁴ Desmond Manderson, "Another Modest Proposal" *Deakin Law Review* 10, no.2 (2005): 644. AGIS Plus Text

⁸⁵ Dershowitz, *Why Terrorism Works*, 150

⁸⁶ Dershowitz, *Why Terrorism Works*, 151

Torture warrants

The idea of torture warrants is not new, as they have been used in English law in the past.⁸⁷ Torture was used in England in the seventeenth century under exceptional circumstances and for the most 'heinous' of crimes, including treason. A warrant could be issued by the Privy Council or the King for the use of torture, and the torture took place in the Tower of London.⁸⁸ Dershowitz believes that because torture is occurring throughout the world, he argues the use of non-lethal torture should be legalised and regulated using the process of a torture warrant.⁸⁹ Interrogational torture has been used in recent times, and because it is illegal, it has been outside the radar of accountability. Part of the problem (from a democratic perspective) is that the citizens of a nation cannot critique or hold a government accountable for action that the government does in secret.⁹⁰ It is the democratic ethos of the west that leads to these dilemmas⁹¹, because one can assume that individual soldiers should not bear the responsibility of deciding whether to torture someone illegally.⁹² Dershowitz notes that if a legal system is based upon the rule of law, then nations should not tolerate actions that are outside of the law. Whoever is making decisions must work within a legal framework; one that has checks and balances to prevent tyrannical rule.⁹³ Dershowitz argues that:

If it is necessary to torture in the ticking bomb case, then our governing laws must accommodate this practice. If we refuse to change our law to accommodate any particular action, then our government should not take that action.⁹⁴

⁸⁷ James, "Torture: What is it, Will it Work and Can it be Justified?", 158

⁸⁸ James, "Torture: What is it, Will it Work and Can it be Justified?", 159

⁸⁹ Kleinig, "Ticking Bombs and Torture Warrants.", 625

⁹⁰ Dershowitz, *Why Terrorism Works*, 152

⁹¹ Dershowitz, *Why Terrorism Works*, 153

⁹² Dershowitz, *Why Terrorism Works*, 152

⁹³ Dershowitz, *Why Terrorism Works*, 153

⁹⁴ Dershowitz, *Why Terrorism Works*, 153

Dershowitz does not think that the decision to torture someone for information is a light one, even for the leader of a nation. Torture violates humanity, and people generally associate the act with regimes such as Nazi Germany and Stalinist Russia.⁹⁵ Despite these moral objections, torture warrants were used successfully in England in the sixteenth and seventeenth centuries.⁹⁶ As the evidentiary requirements to obtain a conviction were so burdensome (two eyewitnesses or a confession), circumstantial evidence was not enough to obtain a conviction. However, the circumstantial evidence was enough to apply for a torture warrant, which then gave the authorities a mean to obtain a confession.⁹⁷ Dershowitz argues that this open and accountable system of torture warrants in England resulted in less torture than in other nations such as France.⁹⁸

In a modern context, Dershowitz notes that the requirements for a judge to grant a torture warrant would be stringent, so it would most likely result in less torture than in an ‘off the books’ system.⁹⁹ Dershowitz believes it would likely decrease the amount of violence that the victim would be subjected to, and because there would be an open and accountable system to obtain a torture warrant, there would be no excuse for rogue torturers to claim necessity as an excuse for any abhorrent act they performed upon the victim.¹⁰⁰ This open and accountable system of torture would avoid a dangerous precedent that ‘off the book’ torture does¹⁰¹, and in conjunction with open discussion about these issues, creates a situation that is far more healthy

⁹⁵ Dershowitz, *Why Terrorism Works*, 155

⁹⁶ Dershowitz, *Why Terrorism Works*, 157

⁹⁷ Dershowitz, *Why Terrorism Works*, 156

⁹⁸ Dershowitz, *Why Terrorism Works*, 158

⁹⁹ Dershowitz, *Why Terrorism Works*, 158

¹⁰⁰ Dershowitz, *Why Terrorism Works*, 159

¹⁰¹ Dershowitz, *Why Terrorism Works*, 162

and less dangerous than if these issues are kept secret or not discussed at all.¹⁰² As a final note, Dershowitz says that:

Whatever option our nation eventually adopts—no torture even to prevent massive terrorism, no torture except with a warrant authorizing (sic) nonlethal torture, or no “officially” approved torture by its selective use beneath the radar screen—the choice is ours to make in a democracy. We do have a choice, and we should make it.¹⁰³

2.3. Bagaric and Clarke – Torture is morally permissible

Upon writing their justification for torture, Mirko Bagaric and Julie Clarke were both academics at Deakin University Law School.¹⁰⁴ The aim of their arguments is to challenge the position of the absolute prohibition of torture, to asking when and in what circumstances a nation can morally justify the use of torture as an interrogation technique.¹⁰⁵ In an article published in 2005, the authors use a ticking bomb scenario where a bomb is about to explode on a commercial airliner within half an hour and there is a suspected terrorist in custody. The terrorist leader will not talk, so the authors ask the question: “who in the world would deny that all possible means should be used to extract the details of the plane and the location of the bomb?”¹⁰⁶ The authors state that the absolute prohibition of interrogational torture is ‘illogical’; arguing that people need to ask when torture can be justified by looking at what will be the greater good to society.¹⁰⁷

¹⁰² Dershowitz, *Why Terrorism Works*, 163

¹⁰³ Dershowitz, *Why Terrorism Works*, 163

¹⁰⁴ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 581

¹⁰⁵ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 583

¹⁰⁶ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 583

¹⁰⁷ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 584

Why Torture Works

Similarly to Dershowitz, Bagaric and Clarke believe that torture can be justified because it sometimes works. The authors claim that torture is a great way to acquire information from a suspect because of the inherent human desire to avoid pain.¹⁰⁸ Bagaric and Clarke cite an example from Germany where an eleven year old boy was missing for three days. The police had a suspect in custody and they were sure he had committed the crime. Seven hours were spent interrogating the suspect, but he continually gave the police false information that was wasting time and resources. The Frankfurt deputy commissioner gave permission for medically supervised infliction of pain. It was only a warning of oncoming pain, but within ten minutes the suspect gave up the location of the boy (he was already dead).¹⁰⁹ The authors note the Israelis claims that ninety terrorist plots have been foiled by ‘coercive interrogation’, and that the French use of torture in Algiers was effective.¹¹⁰ Another example used is that Condoleeza Rice’s claim that extraordinary rendition has prevented terrorist attacks on Europe.¹¹¹

The authors are confident in the use of torture in the ticking bomb scenario because in the hypothetical situation proposed in ticking bomb scenarios, the torturer is positive that the suspect has information.¹¹² They make it clear that it is essential the interrogators have knowledge that the suspect has the information required – that is,

¹⁰⁸ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 588

¹⁰⁹ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 589

¹¹⁰ Mirko Bagaric and Julie Clarke, *Torture: When the Unthinkable is morally permissible* (Albany: State University of New York Press, 2007), 54

¹¹¹ Bagaric, *Torture When the Unthinkable is morally permissible*, 57

¹¹² Bagaric, *Torture When the Unthinkable is morally permissible*, 54

no ‘fishing expeditions’ are allowed.¹¹³ Bagaric and Clarke argue that their critics are wrong when they say that there is too much of a problem with ‘knowledge’ to justify using interrogational torture in the ticking bomb scenario.¹¹⁴ They cite examples of how suspects can be caught on video, and that claiming that mistaken identity is a fatal blow to their argument is no more convincing than saying the legal system should be overhauled because there are currently innocent people in gaol for crimes they did not commit.¹¹⁵ The authors make the point that:

The only salient points to be drawn about the effectiveness of torture are (i) that we know as a fact that humans dislike pain and will try to avoid it, and (ii) all the information from past instances of torture reveals only the following: sometimes it has resulted in suspects divulging information to security officials who have used the information to save other people; sometimes it has not been effective.¹¹⁶

Bagaric and Clarke argue that there is no logic in asserting we can never torture because of the impossibility of perfect knowledge. If this were the case, they argue no one would bother going to work because they cannot be certain that they will not be hit by a bus.¹¹⁷ They also claim that all the incidents of torture cited by critics are torture for abhorrent purposes – to punish, humiliate and dominate. The authors argue that these instances are irrelevant for their purposes because in the hypothetical cases they envisage, there is *reasonable* knowledge that the suspect is guilty, and that their proposal is merely robust physical pressure in a medical setting.¹¹⁸

¹¹³ Bagaric, *Torture When the Unthinkable is morally permissible*, 54

¹¹⁴ Bagaric, *Torture When the Unthinkable is morally permissible*, 58

¹¹⁵ Bagaric, *Torture When the Unthinkable is morally permissible*, 58

¹¹⁶ Bagaric, *Torture When the Unthinkable is morally permissible*, 58-9

¹¹⁷ Bagaric, *Torture When the Unthinkable is morally permissible*, 61-2

¹¹⁸ Bagaric, *Torture When the Unthinkable is morally permissible*, 62

Criticisms of rights-based theories

Bagaric and Clarke describe the role of ‘rights’ as theoretical justification for allowing people to resist being coerced into an action that is for the ‘greater good.’¹¹⁹ Rights in international legal documents include the right to life, liberty and freedom from torture and other degrading punishment.¹²⁰ The authors argue that the concept of rights should not have such moral weight¹²¹ as there are various problems with the concept. They cite Tom Campbell who argued that it is difficult to determine the relationship between differing categories of rights.¹²² In the authors’ opinion, rights can lead to further discrimination against sectors of the community; for example disabled people¹²³ and that there is no way to determine what a genuine right is, and what a ‘fanciful right’ is.¹²⁴ In their opinion, there is no such thing as an ‘absolute right’¹²⁵ and that there are serious problems in ranking rights. This is why in modern times, they argue there have been many ‘dubious’ rights claims including the right to smoke free workplaces and ‘the right to sunshine.’¹²⁶

The authors note that their critics have used the ‘slippery slope’ argument to advocate an absolute ban on torture.¹²⁷ The slippery slope argument is essentially

¹¹⁹ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 599

¹²⁰ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 598

¹²¹ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 602

¹²² Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 602

¹²³ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 602

¹²⁴ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 603

¹²⁵ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 603

¹²⁶ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 603

¹²⁷ Bagaric, *Torture When the Unthinkable is morally permissible*, 42

that if torture is allowed in the narrow circumstances put forward by advocates such as Dershowitz and Bagaric and Clarke, then it will ‘open the floodgates’ and will promote the expansion of torture beyond the narrow scope advocated by proponents of interrogational torture.¹²⁸ Bagaric and Clarke argue that because the scope of when torture can be used in their example is so narrow, there is no room for other rights to be violated if their non-lethal, life saving torture is employed for interrogational purposes only.¹²⁹ They argue that their proposals are about compassion and should not lead to widespread abuse, citing the example of legalised euthanasia in Holland.¹³⁰ According to the authors, these reasons mean that torture will not be expanded to violate other areas of human rights, noting that:

We condone torture only in one circumstance: as a means to save innocent lives. We condone it only for one reason: compassion. A framework based on these criteria has little prospect of being extended to encompass malevolent practices... Torture for compassionate reasons is no more an act of brutality than surgery to transplant a kidney from person to save another person. That is the path we are going down, not brutalizing (sic) people out of hatred.¹³¹

Consequentialism – Making hard choices

Bagaric and Clarke justify their disregard of rights theories in favour of a consequentialist argument, using the most general, basic, and what in my view is shallow utilitarianism. They state that the theory “provides that the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness.”¹³² Their understanding of utilitarianism is that any individual interests are outweighed by the goal of collective well being of a

¹²⁸ Bagaric, *Torture When the Unthinkable is morally permissible*, 42

¹²⁹ Bagaric, *Torture When the Unthinkable is morally permissible*, 44

¹³⁰ Bagaric, *Torture When the Unthinkable is morally permissible*, 46

¹³¹ Bagaric, *Torture When the Unthinkable is morally permissible*, 48

¹³² Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 605

community.¹³³ In regard to torture, Bagaric and Clarke believe that the theory of utilitarianism justifies the use of torture because the pain inflicted upon the victim will be outweighed by the well being experienced by others.¹³⁴ They believe that if the world was to conform to their view, then we will “maximize (sic) human flourishing.”¹³⁵ Bagaric and Clarke note that this understanding of utilitarianism has received criticism because of the possibility that the innocent may be tortured.¹³⁶ They respond by making the claim that even though it seems abhorrent that torture could be inflicted upon innocent parties, the thought of torturing the innocent in the name of the common good does not really inflict upon our morality in a major way.¹³⁷ The authors believe that:

The view that punishing the innocent and torturing individuals is the morally correct action in some circumstances is consistent with and accords with the decisions we as individuals and societies as a whole readily have made and continue to make when faced with extreme and desperate circumstances.¹³⁸

Bagaric and Clarke claim that in extreme situations such as the ticking bomb scenario, people should take the utilitarian option. It is my understanding of their argument that they believe it is morally correct to sacrifice one person for the well being of the majority.¹³⁹ They believe in harm minimisation, and even though they admit that the decision to torture in extreme situations is an appalling decision,

¹³³ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 605

¹³⁴ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 605

¹³⁵ Bagaric, *Torture When the Unthinkable is morally permissible*, 86

¹³⁶ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 606

¹³⁷ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 607

¹³⁸ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 607

¹³⁹ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 607

concepts such as rights and justice are not as important as the achieving of general happiness.¹⁴⁰ Their main example is the decision made by Winston Churchill during World War Two not to warn and evacuate Coventry before a German bombing raid so that the Germans would not know that their code had been cracked.¹⁴¹ As a result, hundreds of people were killed¹⁴², but the authors argue that because of the potential that lives would be saved in the future because of the British knowledge of the code, it was the morally correct decision.¹⁴³ Their argument here is in essence a shallow version of utilitarianism that it is morally right to torture for interrogational reasons because in their calculus it will create the most net happiness.¹⁴⁴

The calculation for assessing when torture can be used

The authors argue that a rational calculation can be used to assess when torture could and should be used for interrogational purposes. They construct their formula as follows:

(1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information.¹⁴⁵

The number of lives at risk is directly related to the magnitude of the harm that is facing the community. The authors argue that it is in only the most extreme

¹⁴⁰ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 608

¹⁴¹ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 608

¹⁴² Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 608

¹⁴³ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 609

¹⁴⁴ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 611

¹⁴⁵ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 611

situations that torture can be used, and this is when there is a great threat to human life.¹⁴⁶ In their opinion, torture should only be used as a last resort¹⁴⁷, so if there are other means of acquiring the information then those other options must be used.¹⁴⁸ There must be limits on the amount of pain that is inflicted upon the victim, but these limits must not be made public, so that potential terrorists cannot just endure and survive the pain.¹⁴⁹ According to the authors, it would be morally wrong for anyone to withhold information that is potentially life-saving, which includes ‘innocent’ people who *may* be aware that something catastrophic is going to happen.¹⁵⁰ For Bagaric and Clarke, what matters is not whether the victim is guilty, but that they actually possess the information that the torturer is seeking.¹⁵¹

The torture formula is set out in an equation where one must multiply the wrongdoing of the victim (W), the number of lives at risk (L) and whether the agent may have the information (P), and divide by the immediacy of the harm (T) which is multiplied by whether there are other options to obtain the information (O) – $W \times L \times P / T \times O$.¹⁵² The result of the formula must reach a threshold (which the authors do not provide), and once this threshold is met, then torture will be allowed. The authors believe that this is better than many other legal tests, and that there is little chance that there will be inappropriate torture if this formula is followed.¹⁵³

¹⁴⁶ Bagaric, *Torture When the Unthinkable is morally permissible*, 35

¹⁴⁷ Bagaric, *Torture When the Unthinkable is morally permissible*, 35

¹⁴⁸ Bagaric, *Torture When the Unthinkable is morally permissible*, 36

¹⁴⁹ Bagaric, *Torture When the Unthinkable is morally permissible*, 36

¹⁵⁰ Bagaric, *Torture When the Unthinkable is morally permissible*, 36

¹⁵¹ Bagaric, *Torture When the Unthinkable is morally permissible*, 37

¹⁵² Bagaric, *Torture When the Unthinkable is morally permissible*, 38

¹⁵³ Bagaric, *Torture When the Unthinkable is morally permissible*, 39

2.4. Conclusion

There is a lot of emotion in the arguments put forth by the proponents of interrogational torture. On one side, this is understandable because they believe that they are dealing with extreme life or death and catastrophic situations. However, it is ironic that they argue in such an emotive way, yet Bagaric and Clarke claim to have created a *rational* calculus for the determination of when torture could and should be used. The arguments presented by the proponents of torture are dangerous in that they should not be viewed as simply a 'harmless thought experiment.' The arguments are oversimplified hypotheticals that are not relatable to the real world. The danger is that people may use these arguments that are based in improbable hypothetical situations and apply them to the real world, using these 'reasoned' academic arguments to justify torture. The next three chapters will note why the ticking bomb scenario is flawed, why interrogational torture is a serious violation of human rights, and how the proponents have misapplied utilitarianism.

Chapter Three: Why the ticking bomb scenario is flawed

3.1. Introduction

In the preceding chapter I outlined the arguments made by proponents of interrogational torture to justify the use of torture in extreme situations. The goal of this chapter is to show that the arguments outlined in the preceding chapter are based principally in emotional appeals and fail in their attempt to argue that torture is not an unacceptable attack on human dignity and that torture is morally justifiable. The first part of this chapter will argue that torture should not be morally justified because it ‘sometimes works’. Torture may work in some extreme situations, but this does not mean it can be morally justifiable. The second part of the chapter will note the effect of torturing someone on both the victim and on the torturer. The effect on the victim and torturer can also have grave consequences on society as well, in that the common usage of state sponsored torture could normalise the use of such acts. The third and final part of the chapter will note the problems associated with the ticking bomb scenario, including problems with actual knowledge and threat, problems with time associated with the ticking bomb scenario, and the problems with the so called necessity of torture to address the situation.

3.2. The reality of torture – it is unreliable

In the preceding chapter, I noted how the proponents argued that interrogational torture can be justified on the basis that it sometimes works. Dershowitz argues that it is the reason it has not been eliminated completely from the world's interrogational techniques is because it sometimes works,¹⁵⁴ while Bagaric and Clarke argue that torture works because of the inherent human desire to avoid pain.¹⁵⁵ Although one can argue that the strong willed (and possibly guilty) people will resist the pain in the name of their cause, and the weak willed will break much more easily.¹⁵⁶

Manderson notes that while torture *may* save a life, there will inevitably be torture that does not save a life.¹⁵⁷ The torturing of suspected terrorists *may* halt an attack in the short term, but torture is likely to create future terrorists as well. Manderson argues that torturing victims may create whole villages or families of terrorists – this would clearly make things worse in the long term.¹⁵⁸ Torture is not something that is restricted to extreme situations as the proponents argue; rather it is used to humiliate and will target 'dissidents' and minorities. Manderson notes that it is a technique used by governments to show the public what the power of the state can do to them.¹⁵⁹ This highlights the power of the government as a deterrent to various behaviour, and can create fear amongst the people who do not know how far the

¹⁵⁴ Dershowitz, *Why Terrorism Works*, 138

¹⁵⁵ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 588

¹⁵⁶ Card, "Ticking Bombs and Interrogation", 4

¹⁵⁷ Manderson, "Another Modest Proposal", 646

¹⁵⁸ Manderson, "Another Modest Proposal", 647

¹⁵⁹ Manderson, "Another Modest Proposal", 647

extent to which the government could exercise its “infinite and random power.”¹⁶⁰

Manderson notes that the reality of torture is that if promotion of torture is continued, no one is safe.¹⁶¹ Imagine the situation where:

Perhaps it might just be a case of mistaken identity, or maybe you happen to be born with a foreign sounding name, or maybe you look suspicious or are the wrong colour, or come from another country with a violent history, or are otherwise associated with the wrong people, or perhaps you were just known for holding unpopular opinions at one time or another.¹⁶²

Torture information is viewed around the world as unreliable, which is why Western legal systems exclude the introduction of information gathered by torture in legal proceedings.¹⁶³ Bob Bretcher notes that the United States Field Manual prohibits the use of coercive interrogational techniques because of the low level of intelligence that is generally gained from using the techniques.¹⁶⁴ According to the US Field Manual, in addition to the poor quality of information that coercive techniques provide, the use of these techniques can also inhibit future interrogations.¹⁶⁵ Then there is the matter that it is likely that these potential terrorists may have undergone training to resist torture. In reality, the timing between planting the bomb in the ticking bomb scenario and when the bomb is to explode is probably not going to be a long time, so with their resistance training and ability to give false information, all the ‘terrorist’ has to do is wait out the torture until the bomb inevitably explodes.¹⁶⁶

¹⁶⁰ Manderson, “Another Modest Proposal”, 647

¹⁶¹ Manderson, “Another Modest Proposal”, 650

¹⁶² Manderson, “Another Modest Proposal”, 650

¹⁶³ Manderson, “Another Modest Proposal”, 645

¹⁶⁴ Bretcher, *Torture and the Ticking Bomb*, 24

¹⁶⁵ Bretcher, *Torture and the Ticking Bomb*, 24

¹⁶⁶ Bretcher, *Torture and the Ticking Bomb*, 27

What is important to take from this part of the chapter is that the likelihood that torture will provide reliable and solid information is extremely unlikely, and the intention to torture in only the most extreme situations is also unlikely. The effect of torture will generally be unknown until it actually happens. McCready notes how torture may work sometimes, but it is impossible to know whether it will work without hindsight.¹⁶⁷ The long term social effects of torture will be devastating; the rage and hostility that torture of both terrorists and the inevitable torture of the innocent will make things worse.¹⁶⁸ Torture will unite and radicalise the enemy, so any victory will most likely be pyrrhic.¹⁶⁹ As the Israeli-Palestinian conflict has shown, the use of torture by the Israelis has only exacerbated hostilities.¹⁷⁰ What must be taken from this is that torture does not serve the intention that the proponents espouse. Torture information is unreliable. Torture unites the enemy. Torture will only serve to exacerbate pain in the long term.

3.3. Effect of torture on the victim, the torturer and society

Effect on the victim

Speaking about his experiences in the US prison Abu Ghraib in Iraq, an unidentified prisoner noted how he was ‘traditionally’ tortured by being beaten and sleep deprived,¹⁷¹ but also the sexual humiliation he suffered when female soldiers

¹⁶⁷ Douglas McCready, “When is torture right?” *Studies in Christian Ethics* 20, no.3 (2007): 389. Doi: 10.1177/0953946807082934

¹⁶⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 135

¹⁶⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 134

¹⁷⁰ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 135

¹⁷¹ “Chapter II, Reading 3 Torture in Abu Ghraib” in *The Phenomenon of Torture*, ed. William F. Schulz (Philadelphia: University of Pennsylvania Press, 2007), 61

touched his genitalia.¹⁷² Another man spoke of his experiences in Uzbekistan, where he was imprisoned for homosexual behaviour. He spoke about how he was injected with a substance and told that it was HIV¹⁷³ and was also tortured using electric shocks.¹⁷⁴ One can hardly imagine the physical and psychological suffering that acts like this would have upon people, yet proponents of torture seem to trivialise this pain. Victims of torture do not come out unscathed. Torture victims in Northern Ireland reportedly suffered from paranoia, insomnia, loss of memory and physical ailments like shaking and twitching.¹⁷⁵ Torture dehumanises the victim by violating what they most value and using what they most value to deflate their convictions.¹⁷⁶ Hunsinger notes the effects on torture victims:

Torture survivors, who afterwards will never be the same, are psychologically and emotionally maimed. They suffer from an inability to establish the bonds of trust, from deadened emotional lives, and from the urge to commit suicide, to which many of them tragically succumb.¹⁷⁷

The intent of torture is to break a person; it is meant to defeat the victim.¹⁷⁸ The victims of torture are likely to experience a complete breakdown of trust, especially when they are forced to betray family members and experience non-physical humiliation.¹⁷⁹ Newer methods of interrogational torture such as sensory deprivation¹⁸⁰ are used in order to exacerbate stress. Victims of torture say that the

¹⁷² "Chapter II, Reading 3 Torture in Abu Ghraib" in *The Phenomenon of Torture*, ed. William F. Schulz (Philadelphia: University of Pennsylvania Press, 2007), 62

¹⁷³ "Chapter II, Reading 9 Torture and Sexuality" in *The Phenomenon of Torture*, ed. William F. Schulz (Philadelphia: University of Pennsylvania Press, 2007), 95

¹⁷⁴ "Chapter II, Reading 9 Torture and Sexuality" in *The Phenomenon of Torture*, ed. William F. Schulz (Philadelphia: University of Pennsylvania Press, 2007), 96

¹⁷⁵ Joseph, "Torture: The Fallacy of the Ticking Bomb", 150

¹⁷⁶ George Hunsinger, "Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails." *Dialogue: A Journal of Philosophy* 47, no.3 (2008): 233. doi 10.1111/j.1540-6385.2008.00397.x

¹⁷⁷ Hunsinger, "Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.", 233

¹⁷⁸ Card, "Ticking Bombs and Interrogation", 8

¹⁷⁹ Card, "Ticking Bombs and Interrogation", 8

¹⁸⁰ Card, "Ticking Bombs and Interrogation", 8

stress never goes away, and that they just have to find a way to deal with this problem instead of trying to heal it.¹⁸¹ Card notes that unlike what is presented on television on shows like *24*, torture victims do not simply recover the next day. They suffer from long term paranoia and depression that can lead to other problems such as alcoholism.¹⁸² The suffering of victims who come from cultures with serious sexual taboos is exacerbated when these taboos are used against them. Victims themselves may succumb to serious shame and social stigma in regards to what happened to them, and could even lead to ‘honour killings’ in the case of women who have experienced sexual violence.¹⁸³

Effect on the torturer

The effect of torture on victims may seem obvious, what is less obvious is the effect that torture can have on the torturer. The relationship between the torturer and the victim is one of power; it is a relationship where one person has absolute power (the torturer), and one person is completely defenceless (the victim).¹⁸⁴ As Manderson puts it, the torturer is the “sole arbitrator of life and death.”¹⁸⁵ Torturing someone has the potential to bring out the worst in humankind. It is not inconceivable that a torturer will unnecessarily torture someone because they need to justify their war crimes; so they will release more sadism and evil onto the world.¹⁸⁶ If torture is made available to interrogators, then it is entirely possible that torturers will continue beyond the legal limit in order to elicit more information from the victim. For example, if a needle under the fingernail does not work, the

¹⁸¹ Card, “Ticking Bombs and Interrogation”, 9

¹⁸² Card, “Ticking Bombs and Interrogation”, 9

¹⁸³ Reyes, “The worst scars are in the mind: psychological torture”, 606

¹⁸⁴ Manderson, “Another Modest Proposal”, 646

¹⁸⁵ Manderson, “Another Modest Proposal”, 646

¹⁸⁶ Hunsinger, “Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.”, 232

torturer could take the violence further and torture an innocent child.¹⁸⁷ Obviously this would be barbaric, and it would have a serious effect on the torturer. Just like the victim is dehumanised by torture, so too is the torturer dehumanised.

Jessica Wolfendale has devoted time to the psychology and effects of torture on the torturer, arguing that in the ticking bomb scenario, the torturer must be a highly competent ‘professional.’¹⁸⁸ These professional torturers must be detached from the reality of what they are doing because they are there to do a job; it is not their job to make moral judgements.¹⁸⁹ As torture is a dehumanising technique, the torturers’ job is to make the victim as sub-human as possible.¹⁹⁰ This can be psychologically damning for a person, as they may start believing that what they are doing is right and that the torture victims deserve what is happening to them. United States soldiers in Iraq have been quoted as believing that the sexual humiliation they forced upon prisoners was justified by the prisoner’s nature.¹⁹¹ The detachment from emotion and dignity that a torturer must undergo is exacerbated as they are forced to obey orders unconditionally.¹⁹² Wolfendale notes that:

He must be able to do his work without being overcome with distress or revulsion, and this means that he must already be accustomed to inflicting suffering and he must be immune to the victim’s distress. The ticking bomb torturer, if he is to be effective, must also accept his orders without question: he must be able to rest assured that the burden of responsibility lies with the authorities and that they have sufficient reason to require his talents.¹⁹³

¹⁸⁷ Joseph, “Torture: The Fallacy of the Ticking Bomb”, 152

¹⁸⁸ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 272

¹⁸⁹ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 279-280

¹⁹⁰ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 281

¹⁹¹ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 281

¹⁹² Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 282

¹⁹³ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 282

James notes that an amateur torturer will likely worsen the situation by killing the victim or helping to unite the ‘enemy.’¹⁹⁴ So the professional torturers are necessary in the fantasy land of the ticking bomb scenario, but part of their training will be to follow orders unconditionally. This means that it is unlikely that they will question the moral legitimacy of an action, or whether the victim is actually guilty or not.¹⁹⁵ Wolfendale believes that in this situation, it is inevitable that torturers will obey ‘illegal and immoral orders.’¹⁹⁶ This blind obedience is unlikely to have positive effects on society, and the suppression of morality on the part of the torturer cannot be good for their mental state. So torture has a serious dehumanising effect on both the victim and the perpetrator of the torture, which leads to the next serious effect of torture which is the detrimental effect that torture has on society. As Wolfendale argues, this training and behaviour might be acceptable in hypothetical situations, but this is the *real world*.¹⁹⁷ In the ticking bomb scenario, torturers will not ignore orders that they believe are morally wrong; they are trained (one might say brainwashed) to ignore their own morality and blindly follow orders.¹⁹⁸ Wolfendale notes that:

...the ticking bomb scenario requires these kinds of torturers – torturers who are quite *deliberately* trained not to question the morality of torture.¹⁹⁹

Effect on society

Torture can have a grave effect on society, in that if behaviour like torture is legalised and allowed within society, it can become normalised. The more prevalent

¹⁹⁴ James, “Torture: What is it, Will it Work and Can it be Justified?”, 157

¹⁹⁵ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 283

¹⁹⁶ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 285

¹⁹⁷ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 286

¹⁹⁸ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 284

¹⁹⁹ Wolfendale, “Training Torturers: A Critique of the “Ticking Bomb” Argument”, 284

acts of torture become, the more likely it is to have a normalising effect on society, and the more likely it will spread.²⁰⁰ Alfred McCoy notes that especially during crises, torture can spread quickly, creating a culture of fear amongst citizens.²⁰¹ The ticking bomb scenario would definitely fit into the idea of a crisis situation.

Matthews argues that proponents of the ticking bomb scenario are trying to ‘cleanse’ the practice of torture in order to make it seem less repugnant. He argues that this cleansing of the concept of torture is another way to normalise the use of torture within society.²⁰² Matthews argues that proponents of the ticking bomb scenario falsely believe that they are acting with pure motives, and that the torture they advocate will not discriminate. In reality, Matthews argues that this is *false*. He elaborates:

We can observe this sanitization (sic) in the elimination from the hypothesis of considerations of gender, personal history, family, political context, economic injustice and oppression. In the “ideal” world of the ticking bomb, interrogators are neither sexist nor racist: they operate from pure motives and with a knight-like devotion to preserving the wellbeing of the innocent.²⁰³

In the real world, torture would not happen for these pure reasons, and it would discriminate. In the real world, minorities such as Jews or homosexuals are targeted – torture is not apolitical.²⁰⁴ Under current national and international law, torture is absolutely prohibited, yet we know that it is occurring throughout the world.²⁰⁵ As a result, no one can confidently say that if the proposals put forth by the proponents of torture are enacted, that governments would not exploit the law and go beyond what is legal. No one in society would be safe in this situation, and it

²⁰⁰ Hunsinger, “Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.”, 232

²⁰¹ Hunsinger, “Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.”, 232

²⁰² Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 73

²⁰³ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 73

²⁰⁴ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 73

²⁰⁵ Card, “Ticking Bombs and Interrogation”, 5

could lead to what Card calls ‘pump and dump’, where people are tortured for information, and then murdered.²⁰⁶

Matthews argues that torture occurs during times of uncertainty and will most likely occur during a political struggle.²⁰⁷ Torture is not about using force against an individual – it is a tool that is used for attacking and breaking down social relationships.²⁰⁸ This is where the effect on society of torturing during the ticking bomb scenario affects society deeply. In my ticking bomb example, if the interrogator believes the only option to save Perth is to torture the innocent children, grandmother or nephew of Dr. Pernicious, Matthews argues that the calculus cited by the proponents of torture will favour the torturing of those innocent parties.²⁰⁹ This torturing of the innocent may just extend to just family members, but may also include academics or journalists that may have defended the victim.²¹⁰ This raises the question whether such a culture of fear would outweigh any possible benefit to society that interrogational torture could provide. Bretcher notes that it is the acceptance of torture that is more worrying than its legalisation.²¹¹ Manderson makes the terrifying point that if torture is allowed within society, then even though the government probably wouldn’t arbitrarily torture, they *could*.²¹²

²⁰⁶ Card, “Ticking Bombs and Interrogation”, 5

²⁰⁷ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 90

²⁰⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 90

²⁰⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 90

²¹⁰ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 91

²¹¹ Bretcher, *Torture and the Ticking Bomb*, 21

²¹² Manderson, “Another Modest Proposal”, 650

3.4. Problems with the ticking bomb scenario

Knowledge and threat

The proponents of using torture in the ticking bomb scenario base their arguments on the assumption that the interrogator knows that the suspect has the information, and that there is a catastrophic threat to society. However, as Joseph argues there are too many variables to take into account in the ticking bomb scenario. She argues that it is impossible to know whether the suspect knows where the bomb is located, whether there is another plan to avoid detection if someone is captured, or whether the suspect in custody will consistently give false information.²¹³ The torturer will never know beforehand if the suspect is guilty or innocent, and they will never know if there is even a real threat if the potential catastrophic event has not yet occurred.²¹⁴ Manderson notes that the torturer can only *suspect* and not *know*.²¹⁵ McCready also notes that is impossible to know beforehand whether or not torture will be effective.²¹⁶ The very logic of using torture is flawed, and one must ask the questions:

Suppose our supposed terrorist denies knowing anything. Do we let him go... or torture him some more? When exactly do we stop? When exactly do we believe what the victim is telling us when the justification of torture is precisely that we only believe them when they tell us what we want to know, without already knowing it?²¹⁷

Relating to my example of a ticking bomb scenario, the SWAT team that captured Dr. Pernicious really do not *know*. They do not know that the ‘imminent threat’ is real – Dr. Pernicious could have announced that there is a bomb as an extortion

²¹³ Joseph, “Torture: The Fallacy of the Ticking Bomb”, 152

²¹⁴ Manderson, “Another Modest Proposal”, 645

²¹⁵ Manderson, “Another Modest Proposal”, 646

²¹⁶ McCready, “When is torture right?”, 389

²¹⁷ Manderson, “Another Modest Proposal”, 646

threat, or to create a distraction so his associates can carry out a series of robberies. If the police decide to torture his accomplices, how far do they take the torture if they are refusing to divulge information? We can assume that Dr. Pernicious has a large network of associates, so if they are captured and they know that the threat is real, they may be strong enough to resist the torture until the time limit has expired. If there is not a real threat, then the police are wasting their time while the network of Dr. Pernicious is carrying out his plan. Then there is the fact that they might have captured innocent people who were working for Dr. Pernicious. They may have had no idea that he was an evil scientist. They could just be computer programmers or even cleaners who are working in what they believe to be a legitimate job. If the innocent are added to an unreal threat, then the moral morass deepens.

Matthews argues that no intelligence department will ever work with purely real threats. Every threat is only *potential*.²¹⁸ Matthews argues that there is essentially an infinite number of threats because every “logically possible threat” could lead to a real threat.²¹⁹ He also notes that if torture is acceptable for all possible threats, then the number of people who will be tortured will be increased.²²⁰ While the proponents of the ticking bomb scenario argue that torture will only be employed when the torturer has real knowledge of an actual threat, as I have shown, there is too much risk, and it is an unjustifiable assumption, in assuming such knowledge. The worst outcome of such assumptions is that innocent people could be tortured unnecessarily for unreal threats. It is unrealistic to believe, that in my example, the police have absolute knowledge that there is a bomb in Perth and that everyone they

²¹⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 79

²¹⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 79

²²⁰ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 78

have taken into custody be able to provide quality information. Those innocent computer programmers or cleaners may be tortured for an unreal threat. Now how could anyone morally justify this? As Matthews says:

Once we recognize (sic) that threats are always empirically and conceptually vague, we realize (sic) that the torture of the ignorant and innocent is built-in no matter how much we redefine the ticking-bomb hypothesis. The interrogator could easily believe that a given individual knows the relevant information about a threat even though no threat exists. *The victim is tortured because of belief in a threat, not because of its reality.* (emphasis added)²²¹

Time

The proponents of torture in the ticking bomb scenario always presuppose that time is of the utmost importance. There is an imminent threat to society and torture is required to get the information from the suspect in order to save society from the exploding of a bomb. In my example, Dr. Pernicious has announced that there is only one hour until the bomb that he has supposedly planted in Perth will detonate. Is there enough time to gather any reliable information? Are there alternatives to torture?

Matthews argues that imminence is a vague concept, but accepts that an hour would qualify as an imminent threat. However, he makes the point that torture will take time, and that the less time there is, the less likely that torture will be effective in that timeframe.²²² Matthews notes also that torture takes time to have an effect on the victim and that skill is required; it is not something that can be employed as a last resort because nothing else can be done.²²³ In general, if a threat is real, meaning that a bomb has ‘started ticking’, then it is unlikely that there will be a

²²¹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 80

²²² Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 74

²²³ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 75

great deal of time until the bomb explodes. Once the bomb has been planted and is ready to explode, it is already too late.²²⁴ Even if we expand the time a little, so that the threat is imminent this can make things worse. The interrogators are likely to be put under pressure to find the bomb, meaning that they will most likely increase their use of brutality in an effort to find out more information.²²⁵ Matthews notes that:

It is expansive not merely because of its conceptual vagueness but also because of the pressures under which intelligence agents are put to get actionable intelligence. It is expansive because of the fog of war, which renders it difficult for intelligence agents even to distinguish real from possible threats, let alone imminent from distant threats.²²⁶

The proponents of torture argue that the threat must be imminent, yet as we can see it is impossible to both determine whether or not the threat actually exists, and whether the threat is indeed imminent. One of the examples that Dershowitz uses to justify the use of torture is from the Philippines where a man was beaten for sixty-seven days until he gave up what Dershowitz described as ‘lifesaving information.’²²⁷ Sixty-seven days? It is farcical to use torturing someone for sixty-seven days in support of an argument for torture in emergency situations. Bretcher phrases his criticism of this argument as “so much for Dershowitz’s arguments about the effectiveness of torture in cases where time really is of the essence.”²²⁸ In the more imminent situation, all the suspect has to do is endure the torture until the event occurs.²²⁹

²²⁴ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 76

²²⁵ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 76

²²⁶ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 76

²²⁷ Dershowitz, *Why Terrorism Works*, 137

²²⁸ Bretcher, *Torture and the Ticking Bomb*, 26

²²⁹ Bretcher, *Torture and the Ticking Bomb*, 27

Card argues that more humane methods of interrogation are more likely to be successful. Interrogators will get better quality information from humane methods of interrogation than they would from torturing the suspect.²³⁰ One would most likely get more reliable information from attempting to gain the confidence of the suspect, rather than indulging in brutality.²³¹ Card makes the point that if the threat is so imminent that no other method beside torture will work then it is more likely that there is inadequate time to find the bomb.²³² If there is not enough time to find the ticking bomb, but interrogators think that obtaining a torture warrant will help, how is there going to be sufficient time to obtain a torture warrant? Bretcher notes how there are many situations (potentially less catastrophic than the ticking bomb scenario) where the police will not have enough time to obtain a warrant. There would be a long delay in issuing the warrant because there would need to be evidence that it is necessary, and there would need to be time to prepare all the case work. The Judge would also need time to consider the case and time to issue the warrant.²³³ The conclusion that imminence is a good justification for torture is farcical.

Necessity – There are always alternatives

The imminence of the danger and the assumed knowledge of the interrogator have led to the proponents of torture arguing that as a last resort, it is necessary to torture the suspect in order to extract information. Matthews argues that this is a strange concept because there are a myriad of interrogation options available to the interrogator, whilst there is also the matter that there is no real

²³⁰ Card, "Ticking Bombs and Interrogation", 11

²³¹ Card, "Ticking Bombs and Interrogation", 12

²³² Card, "Ticking Bombs and Interrogation", 12

²³³ Bretcher, *Torture and the Ticking Bomb*, 30

evidence that torture is an effective interrogation technique.²³⁴ The concept of time is important here, because if there is enough time to torture, then there should be enough time for more proven techniques to be effective.²³⁵ According to the United States Field Manual, there are at least fifteen proven interrogational techniques that can be used to extract information from a suspect,²³⁶ and the use of force is one that will not provide reliable information, and will harm future interrogations.²³⁷ Matthews argues that if torture is used as a ‘last resort’, it is most probably too late.²³⁸ The available time should have been spent using more reliable techniques. This leads him to say:

So if torture is to be employed, either it will have to be employed in the absence of an imminent threat or it will have to be used as a technique of first resort.²³⁹

Matthews believes that there is generally a resistance on the part of the suspect to the torture, so it will ultimately be counter-productive to use it.²⁴⁰ Card notes that if more reliable techniques have failed, then it is unlikely that torture will work if it is employed.²⁴¹ It is possible that during the less coercive part of the interrogation the interrogator has missed crucial information because they are inexperienced,²⁴² or perhaps the interrogator just decides it is ‘worth a shot’ to try torture.²⁴³ There can be no moral basis for torture on the chance it might work, or for allowing an inexperienced interrogator to torture because they have missed something that they should not have.

²³⁴ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 81

²³⁵ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 81

²³⁶ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 81-82

²³⁷ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 81

²³⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 82

²³⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 82

²⁴⁰ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 83

²⁴¹ Card, “Ticking Bombs and Interrogation”, 12

²⁴² Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 83

²⁴³ Card, “Ticking Bombs and Interrogation”, 13

3.5. Conclusion

The ticking bomb scenario is flawed. There is no reliable evidence that torture will be effective in any interrogational situation, let alone one where the imminence of the threat is so important. The proponents of torture in the ticking bomb scenario have ignored the reality of torture and used an unrealistic hypothetical scenario to provide unreal justification for what cannot be justified. The impact that torture would have on society would be vast. No one would be safe – whether it is safety from state sponsored torture, or the increase in enemy activity because of the torturing of their comrades. There are always alternatives to torture, and they should be employed. This chapter has been centred on the impracticality of the use of interrogational torture and how it is logically and practically flawed in the case of the ticking bomb scenario. The next chapter will focus on how torture is an absolute violation of human rights and why the absolute prohibition of torture by international law must remain, no matter how many proponents of the ticking bomb scenario there are.

Chapter Four: Torture is the absolute violation of human rights

4.1. Introduction

In the last chapter I noted the more practical arguments against torture and the ticking bomb scenario. While the arguments are strong in their own right, they were also important as an introduction to this and the next chapter on utilitarian arguments against torture and the ticking bomb. In this chapter, I will argue that torture is rightly prohibited in international law and there should be no exceptions made for emergency situations. The first part of the chapter will note the background to torture and the ticking bomb, namely its absolute prohibition in international law. I will also explore Locke's notion of liberty and how torture is a violation of this most basic of rights. The second part of the chapter will argue that using torture, even in extreme and rare situations is the violation of the concept of liberty that western society is based upon. I will argue that allowing torture in emergency situations may not 'destroy' liberal democracy, but it is a blow to our concept of individual freedom.

4.2. Background to human rights and torture

Torture and International Law

There are various international conventions and treaties that ban the use of torture throughout the world including the Universal Declaration of Human Rights,

International Covenant on Civil and Political Rights, European Convention on Human Rights and the UN Convention against Torture.²⁴⁴ In international law, torture is also considered to be a war crime²⁴⁵ and a crime against humanity.²⁴⁶ Over time, treaties and tribunals have been established to punish behaviour that can be viewed as a serious violation of human rights.²⁴⁷ Whilst these treaties and conventions are significant, the most important concept in international law when it comes to torture is customary international law, which is a category that torture falls into.²⁴⁸

Freedom from torture is so important in international law that it falls under customary international law. This means that all states are bound to punish acts of torture anywhere around the world. Torture is described by Ratner as a “freestanding international crime.”²⁴⁹ International Customary Law is to be enforced if “actual practice...can be found, based on a sense of legal obligation.”²⁵⁰ The signing of treaties, decisions and acts of officials and decisions of international courts over a long period of time contribute to whether a right or concept is found to fall under customary international law.²⁵¹

However, there is an argument that there is a slight problem with torture as part of customary international law, because despite the fact the prohibition of torture has

²⁴⁴ Bagaric, *Torture When the Unthinkable is morally permissible*, 10

²⁴⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1 (Cambridge: Cambridge University Press, 2005), 574

²⁴⁶ Ratner, *Accountability for Human Rights Atrocities in International Law*, 121

²⁴⁷ Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009), 270

²⁴⁸ Bagaric, *Torture When the Unthinkable is morally permissible*, 10

²⁴⁹ Ratner, *Accountability for Human Rights Atrocities in International Law*, 122

²⁵⁰ Gerhard Werle, *Principles of International Criminal Law* (The Netherlands: TMC Asser Press, 2005), 46

²⁵¹ Werle, *Principles of International Criminal Law*, 46

received overwhelming support in the international community,²⁵² states continually violate the absolute prohibition and then try to hide the fact that they do so.²⁵³ For example, torture will be prosecuted as a crime against humanity if it is part of a “widespread and systematic attack”, but if it does not fall under this category then it might not be prosecuted under customary international law.²⁵⁴ But, one could also mount the argument that if nations are hiding their use of torture then it adds weight to the customary international law argument because they are scared of its absolute prohibition.

What is important here is not the semantics as to whether torture might not fit into customary international law in some situations, but that there is a general consensus among the international community that torture is a serious breach of human rights. The international community has got this right – torture is a serious breach of human rights, and debating whether or not it is a breach could take us down a dangerous road.

The concept of liberty

We do not live in a Hobbesian society. In the western world once we consent to governmental power we are not absolutely bound to the will of the sovereign.²⁵⁵ This is not a society where once you consent to governmental power, you are bound to the will of the sovereign, no matter how abhorrent the actions of that sovereign are.²⁵⁶ The liberal democratic nations follow a more Lockean

²⁵² Michael Byers, *Custom, Power and the Power of Rules* (United Kingdom: Cambridge University Press, 1999), 135

²⁵³ Byers, *Custom, Power and the Power of Rules*, 136

²⁵⁴ Fohr, *Prosecuting Serious Human Rights Violations*, 275

²⁵⁵ Thomas Hobbes, *Leviathan* (New York: Barnes & Noble, 2004), 109

²⁵⁶ Hobbes, *Leviathan*, 110

tradition where citizens are not absolutely bound to the sovereign, and the government should protect the life and liberties of the people.²⁵⁷ Locke argued that:

...whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees...And all this to be directed to no other end but the peace, safety and public good of the people.²⁵⁸

What is concerning about the recent use of torture in relation to Locke is the ‘established standing laws’ aspect. Part of Dershowitz’s argument is that because he believes torture is being pushed ‘under the radar’, it should be legalised to bring it under close scrutiny and accountability.²⁵⁹ However, the recent use of torture throughout the world does not protect the liberty of the people as it is not directed to the peace, safety and good of the people. Similarly, the rendering of terror suspects to other nations that are more likely to use torture as an interrogation technique is certainly not protecting the liberty of the people. The United States has been known to use this tactic²⁶⁰ as well as Canada, Sweden, Holland, Britain and Austria.²⁶¹ So it seems obvious that the recent use of torture is a violation of liberty, but would the legalisation of interrogational torture in emergency situations violate Locke’s concept of liberty? Dershowitz argues that opening torture to ‘account’ would maximise civil liberties for the people.²⁶² So one must ask the question, can this be justified?

²⁵⁷ John Locke, *The Second Treatise of Government and a Letter Concerning Toleration* (New York: Dover Publications, 2002), 57

²⁵⁸ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 59

²⁵⁹ Joseph, “Torture: The Fallacy of the Ticking Bomb”, 149

²⁶⁰ Arimatsu, “Outsourcing Torture”, 18

²⁶¹ Arimatsu, “Outsourcing Torture”, 17

²⁶² Dershowitz, *Why Terrorism Works*, 141

If one puts Dershowitz's arguments into a Lockean context, it is likely that he would argue torture is good for the peace, safety and public good of the people. However, Locke argued that the government should in no way impoverish or enslave the people.²⁶³ People would not consent to governmental power if that power is going to be used to restrict their liberty, so the government must act in the best interests of the people.²⁶⁴ As the previous chapter noted, torture can have many detrimental effects on society that is clearly not acting in the best interests of the people and their liberty. Torture creates a culture of fear in society,²⁶⁵ targets political, religious and ethnic minorities,²⁶⁶ breaks down social relationships,²⁶⁷ and can have a never ending array of possibly innocent victims.²⁶⁸ Clearly the targeting of minorities and the breaking down of social relationships is not acting in the best interests of society. There is also the fact that torturing people in war situations can make things worse by uniting the enemy.²⁶⁹ It is certainly not in the best interests of the public to unite an enemy that may have the potential to harm the public that the torture is supposedly meant to help protect.

Locke argued that a ruler becomes a tyrant when that ruler exercises their power beyond that which they have the right to do, and does not govern with the people's best interests at heart.²⁷⁰ He said that the difference between a king and a tyrant is:

...that one makes the laws the bounds of his power, and the good of the public the end of his government; the other makes all give way to his own will and appetite.²⁷¹

²⁶³ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 62

²⁶⁴ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 63

²⁶⁵ Hunsinger, "Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.", 232

²⁶⁶ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 73

²⁶⁷ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 90

²⁶⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 91

²⁶⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 134

²⁷⁰ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 91

Once the law ends and tyranny begins, everyone in that society has the right to stand up to and resist the oppressor.²⁷² Locke goes on to say:

Whoever uses force without right, as every one does in society who does it without law, puts himself into a state of war with those against whom he so uses it; and in that state all former ties are cancelled, all other rights cease, and every one has a right to defend himself and to resist the aggressor.²⁷³

The proponents of torture are likely to argue that no one has the right to resist the government if torture is brought under the scope of accountability with torture warrants because they are trying to protect the people, and maximise human rights. Torture is how the government can show of what they can do to you, and how it can control you – it is a show of power.²⁷⁴ There is bound to be unnecessary torture²⁷⁵ and people who may be a victim of mistaken identity or were in the wrong place at the wrong time.²⁷⁶ The proponents of torture in emergency situations seemingly ignore these effects. The dehumanising effects of torture can leave people with insomnia, loss of memory and paranoia²⁷⁷ and we really do not know whether torturers will take things further by if the initial torture is unsuccessful by torturing innocent children.²⁷⁸

²⁷¹ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 92

²⁷² Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 92

²⁷³ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 105

²⁷⁴ Manderson, "Another Modest Proposal", 647

²⁷⁵ Manderson, "Another Modest Proposal", 646

²⁷⁶ Manderson, "Another Modest Proposal", 650

²⁷⁷ Joseph, "Torture: The Fallacy of the Ticking Bomb", 150

²⁷⁸ Joseph, "Torture: The Fallacy of the Ticking Bomb", 152

It is impossible to know whether there is an actual threat or not or whether the suspect that we supposedly ‘know’ is guilty is in fact guilty.²⁷⁹ In the previous chapter I noted how Manderson argues that torturers can *suspect* that someone has a degree of guilt, but not *know* for certain.²⁸⁰ So if torture is administered (whether state sponsored or not), a serious violation of liberty is occurring without any absolute knowledge that there is a serious threat or that the person has any kind of guilt. In other words, if Dershowitz’s position is adopted then serious violations of human dignity and liberty that cannot be proven without hindsight will occur.

Torture is a violation of liberty, and if one especially thinks of the potential for torture of the innocent, including children, then there is no doubt that torture is not protecting the people, it is not acting in our best interests and it is not protecting our liberty. If anything, it is putting the people in a state of war with their government.

4.3. Sacrificing Democratic Values

Torture does not maximise rights

Dershowitz argues that legalising the torture warrant and allowing state sponsored torture in emergency situations would *maximise* civil liberties.²⁸¹ This is not the reality of torture. The reality of torture is that it is a way to reinforce the power of the state. In no way does torture establish justice.²⁸² Bagaric and Clarke

²⁷⁹ Manderson, “Another Modest Proposal”, 645

²⁸⁰ Manderson, “Another Modest Proposal”, 646

²⁸¹ Dershowitz, *Why Terrorism Works*, 141

²⁸² Manderson, “Another Modest Proposal”, 642

claim that their essay can be seen as a ‘harmless thought experiment.’²⁸³ Manderson argues that their attempt morally to justify the use of torture in emergency situations by democratic states could lead to rogue states using it in justifying their use of torture because democratic states also use torture.²⁸⁴ Manderson argues that Bagaric and Clarke do not seem to understand the reality of torture. He notes that:

Perhaps they just have no imagination. They do not appear to understand that torture is not simply pain. It is the experience of absolute powerlessness that reduces the victim, in their own eyes as well as their torturer’s, to an animal, a body without will or dignity of any kind. It is the destruction of identity.²⁸⁵

Manderson argues that torture is not something that will be beneficial to society, as the proponents of torture argue; rather it is something that will be used to humiliate and punish. This humiliation and punishment will most likely happen to minorities within society.²⁸⁶ Most importantly, he notes that torture enhances government control – it is a way for the state to demonstrate its power over the community.²⁸⁷ This is why we need human rights. This is why we need the absolute prohibition on torture. Human rights are there to protect all of us unconditionally.²⁸⁸

The proponents of torture use the de-criminalisation (and possible legalisation) of prostitution and drug use as an example of a harm minimisation technique that could be compared to the legalisation of the torture warrant. However, it cannot be compared to the legalisation of drugs or prostitution.²⁸⁹ Making the sex industry illegal will force it underground; it does not go away. This means that it is harder

²⁸³ Manderson, “Another Modest Proposal”, 644

²⁸⁴ Manderson, “Another Modest Proposal”, 644

²⁸⁵ Manderson, “Another Modest Proposal”, 647

²⁸⁶ Manderson, “Another Modest Proposal”, 647

²⁸⁷ Manderson, “Another Modest Proposal”, 647

²⁸⁸ Manderson, “Another Modest Proposal”, 651

²⁸⁹ Manderson, “Another Modest Proposal”, 648

for the government to regulate the criminal aspects of the industry and it puts the (mainly) women working in the industry under great risk and danger.²⁹⁰ However the de-criminalisation or legalisation of the sex industry can have many positive effects. When the industry is pushed underground making it less safe for the sex workers, it is more likely that risky sexual behaviour will thrive.²⁹¹ De-criminalisation of the sex industry means that safer sex will occur. For example the mandatory use of condoms will clearly contribute to the safety of the industry, with evidence showing that using condoms dramatically reduces instances of sexually transmitted infections; Gonorrhoea 70%, Chlamydia up to 33% and HIV 85%.²⁹² The New Zealand *Prostitution Reform Act 2003* had the aims of protecting the human rights of the sex workers, as well as shielding them from exploitation.²⁹³

Clearly this harm minimisation strategy has positive effects in the sex industry, but this does not apply to torture. Manderson notes that harm minimisation strategies in the sex industry and with relation to drugs have the goal of improving the conditions (health and social) of the people active in the sex industry or drug users.²⁹⁴ However, the danger and violence that come from torture are not conditions or side effects of its use; rather, the violence and danger are fundamental.²⁹⁵ Manderson notes that:

²⁹⁰ Thomas Crofts & Tracey Summerfield, "The Licensing of Sex Work: Regulating and Industry or Enforcing Public Morality," *University of Western Australia Law Review* 33, no.2 (2007): 293. AGIS Plus Text

²⁹¹ P. Heather Lyttle & Sandra C. Thompson, "Maintaining Sexual health in commercial sex workers in Australia: condom effectiveness, screening, and management after acquiring sexually transmissible infections" *Australian and New Zealand Journal of Public Health*, 28, no.4 (2004): 352. Doi: 10.1111/j.1467-842X.2004.tb00443.x

²⁹² Lyttle, "Maintaining Sexual health in commercial sex workers in Australia: condom effectiveness, screening, and management after acquiring sexually transmissible infections", 353

²⁹³ *Prostitution Reform Act 2003* (NZ), s3

²⁹⁴ Manderson, "Another Modest Proposal", 648

²⁹⁵ Manderson, "Another Modest Proposal", 648

Danger and pain are not a by-product of torture (as they are, for example, to a considerable degree a by-product of the current regime of drug prohibition); they are intrinsic to it. Were torture done in public, were it supervised by a qualified medical practitioner in a hygienic environment, were it made respectable – tell me, would any of this make torture better? Once again Voltaire comes to mind: “If we believe absurdities, we shall commit atrocities.”²⁹⁶

I argued earlier that torturing in emergency situations is a serious violation of the liberty of the people. One can go further and argue that it could lead to the death of liberal democracy. If we allow the ‘terrorists’ to intimidate such that we torture and violate the fundamental natural right to liberty, then one can argue that they have ‘won.’ The evidence that there can be real benefits from the use of torture is dubious, but what can be guaranteed is violation of human rights.

Training of torturers

As I have previously noted, in the fantasy land of the ticking bomb scenario, if the torturing of a suspect is going to produce any reasonable information, there must be professional and highly trained torturers. If the torturer has not been properly trained then they could make the situation much worse by killing the suspect.²⁹⁷ But one has to ask the question; if the torture has to be effective in such a short amount of time, how are the torturers going to be properly trained to deal with such a unique set of circumstances? Matthews notes that to develop any effective interrogation technique, then there needs to be a research program implemented to test and trial the technique.²⁹⁸ According to Matthews, the techniques that have been employed in Iraq and Guantanamo Bay were researched and developed within the

²⁹⁶ Manderson, “Another Modest Proposal”, 648

²⁹⁷ James, “Torture: What is it, Will it Work and Can it be Justified?”, 157

²⁹⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 123

scientific community with medical supervision.²⁹⁹ He argues that this is a gross violation of medical ethics and is a corruption of ethos of medical practitioners.³⁰⁰

In order to develop and test torture techniques effectively, Matthews notes that there needs to be financial resources, scientific observation and research subjects.³⁰¹

These last two words are frightening – ‘research subjects.’ Matthews argues that at some point in this ‘scientific’ process, there will be the need to test the techniques on unwilling, innocent victims. Unlike a more ethical scientific project, there would have to be a ban on subjects leaving the study if they became uncomfortable.³⁰²

There is an inevitable logic that if there is going to be any serious testing of the effectiveness of torturing in emergency situations, the innocent will have to be tortured.³⁰³ Matthews explains that this has happened in the past, noting that:

...the CIA injected not only North Korean prisoners, but also spiked drinks at a New York City party house...pumped hallucinogens into children at summer camp...and collected powerful toxins from Amazon tribes.³⁰⁴

What this means is that torture will never be imposed solely on ‘terrorists’; it will be imposed upon innocent, unwilling victims who are just being used for scientific experiment.³⁰⁵ The use of prisoners for torture experiments, or the taking of people from the street for such experiments is an absolute violation of their right to personal integrity and liberty. I do not think there could possibly be a better example of tyranny in a Lockean sense. Locke said that the government “hath no

²⁹⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 123

³⁰⁰ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 123

³⁰¹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 123

³⁰² Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 123

³⁰³ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 124

³⁰⁴ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 124

³⁰⁵ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 125

other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects.”³⁰⁶ While the testing of torture on innocent victims may not destroy them in the sense of bringing about their deaths, as I have shown in previous chapters, the psychological and physical toll that torture has upon people is inestimable, and should be considered the destruction of the person.

4.4. Conclusion

Torture is a violation of civil liberties and human rights. There is little evidence to suggest otherwise, yet the proponents of torture attempt to argue that the regulation of torture enhances human rights. The international community does not condone torture, and the international law on the subject is clear – torture is abhorrent and should be banned. Torture is a violation of liberty; it destroys lives and communities. Liberty may well be the most important thing that we have in the western world, and we should not be playing with it and acting like it is something that some people do not deserve.

³⁰⁶ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 62

Chapter Five – Utilitarianism and Torture

5.1. Introduction

The proponents of torture have used utilitarianism to justify their position on the use of interrogational torture. In my view they do not understand utilitarianism sufficiently to use the theory to justify their position on interrogational torture in emergency situations. Therefore this chapter will be explaining and then critiquing the way in which the proponents have used utilitarianism to support their case. The first part of the chapter will provide an explanation of utilitarianism, and explain the difference between two major types of utilitarianism – act and rule. The second part of the chapter will argue that torture proponents have misapplied utilitarianism when they use an act utilitarian calculus. Bagaric and Clarke's formula is embedded with rules, which is incompatible with act utilitarianism. This concern is no mere semantic argument, as no act utilitarian calculus contains rules. This leads to their calculus becoming invalid. Bagaric and Clarke's calculus is not being used for trivial matters such as whether or not one should follow road rules, but it is being used to justify the use of torture – this is *serious*. The third part of the chapter will argue that no utilitarian should support the use of torture in emergency situations because there are serious problems with whether there are actually concrete benefits to torturing, and there are serious problems with evaluating pain. There are also serious problems with the time needed for torture to be effective. This does not help their act utilitarian calculus.

5.2. Forms of Utilitarianism

Utilitarianism is based upon the principle of utility, which Bentham defined as approving or disapproving “...every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest in question.”³⁰⁷ For Bentham, this was based upon the world being governed by the concepts of pleasure and pain, and that these principles guide what people should and should not do.³⁰⁸ Bentham believed conduct should be based upon the principle of the ‘greatest happiness of the greatest number’, upon which all political decision, and conceptions of good and bad should be based.³⁰⁹ Governmental action that follows the principle of utility is one where the augmentation of happiness is greater than the reducing of happiness.³¹⁰

Bentham rejected the concepts of natural law,³¹¹ believing that appealing to ‘imaginary’ concepts such as the ‘law of nature’ could breed disobedience.³¹² For Bentham, decisions need to be based upon real concepts such as pleasure and pain³¹³ with the goal of the maximisation of happiness.³¹⁴ Bentham argued that there is a need to follow the principle of utility, as basing decisions on what he believed to be dogmatic ‘external standards of morality’ would lead to chaos because these external standards could not be tested in the same way as the

³⁰⁷ Jeremy Bentham, *An Introduction to the Principles and Morals of Legislation* (New York: Barnes & Noble, 2008), 1

³⁰⁸ Bentham, *An Introduction to the Principles and Morals of Legislation*, 1

³⁰⁹ Anthony Kenny, *An Illustrated Brief History of Western Philosophy* (Carlton: Blackwell Publishing, 1998), 310

³¹⁰ Bentham, *An Introduction to the Principles and Morals of Legislation*, 2

³¹¹ J.H. Burns and H.L.A. Hart, eds. *Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government* (London: The Athlone Press, 1977), 10

³¹² James Steintrager. *Bentham* (Oxford: Alden Press, 1977), 16

³¹³ Stephen Leslie, *The English Utilitarians*, vol 1 (New York: Augustus M. Kelley Publishers), 241

³¹⁴ Leslie, *The English Utilitarians*, 244

principle of utility.³¹⁵ Obviously Jeremy Bentham's theories go much deeper, but this brief overview provides good background to the forms of utilitarianism I will now explain – act utilitarianism, rule utilitarianism and conditional rule utilitarianism.

Act Utilitarianism

J.J.C. Smart has defined act utilitarianism as "...the view that the rightness or wrongness of an action is to be judged by the consequences, good or bad, *of the action itself*. (emphasis added)"³¹⁶ Smart believed one should perform action A over action B because action A will offer more happiness to people than action B.³¹⁷ Act utilitarians believe that acts should be judged on their individual merits³¹⁸ and that the morally correct action is the one that produces the best results.³¹⁹ Act utilitarians believe that calculations of utility are the best way to produce happiness, and that if one replaces individual calculations of utility with general rules of conduct; it is nothing but 'rule worship.'³²⁰ Emmons notes that act utilitarians argue that it is 'perverse' to conform to general rules of conduct when one may be able to produce better results (i.e. more happiness) with individual calculations of utility.³²¹ This is what I refer to as an act utilitarian calculus.

³¹⁵ Leslie, *The English Utilitarians*, 242

³¹⁶ JJC Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), 9

³¹⁷ Charles Landesman, "A Note on Act Utilitarianism" *The Philosophical Review* 73, no.2 (1964): 243. Doi: 10.2307/j100320

³¹⁸ Robin Barrow, *Utilitarianism: A Contemporary Statement* (England: Edward Elgar Publishing Limited, 1991), 110

³¹⁹ Landesman, "A Note on Act Utilitarianism", 245

³²⁰ Landesman, "A Note on Act Utilitarianism", 244

³²¹ Donald C. Emmons, "VI. – Act vs. Rule Utilitarianism" *Mind* 82, no.326 (1973): 227-8. Doi: 10.193/mind/LXXXII.326.226

One of the criticisms of act utilitarianism is that it is impractical to calculate utility for each action consistently, so there is a need for general rules.³²² Rule utilitarians believe that it is not practical to calculate utility constantly; and alarmingly; they believe that it is possible that an act utilitarian calculus will morally approve of an action when it leads only to a slight preferencing of the good over the bad.³²³

Barrow notes that it is not unthinkable that an act utilitarian could preference lying, killing and cheating, even the sacrificing of an innocent victim, over what would normally be considered moral, just for a marginal increase in utility.³²⁴

It is important to understand that the central characteristic of act utilitarianism is that each individual case should be judged on its merits.³²⁵ There is room for rules within act utilitarianism, but only in situations that do not place a burden on the actor such as maintaining friendships.³²⁶ It is rule utilitarianism that absolutely preferences the use of rules of conduct, not act utilitarianism.³²⁷ Smart believed that there is an inherent danger in following rules of conduct because someone may be forced into an action that will cause unhappiness.³²⁸ Landesman notes people could lie or renege on a promise and then morally regret doing so, however according to act utilitarians this is irrational and “a symptom of rule worship.”³²⁹

³²² Richard T. Garner, “Some Remarks on Act Utilitarianism.” *Mind* 78. No.309 (1969): 126. JSTOR

³²³ Garner, “Some Remarks on Act Utilitarianism.”, 127

³²⁴ Barrow, *Utilitarianism: A Contemporary Statement*, 108

³²⁵ Barrow, *Utilitarianism: A Contemporary Statement*, 114

³²⁶ Barrow, *Utilitarianism: A Contemporary Statement*, 118

³²⁷ Barrow, *Utilitarianism: A Contemporary Statement*, 114

³²⁸ Landesman, “A Note on Act Utilitarianism”, 245

³²⁹ Landesman, “A Note on Act Utilitarianism”, 245

Rule Utilitarianism

Rule utilitarians believe that “the rightness or wrongness of an action is to be judged by the goodness or badness of the consequences of a rule that everyone should perform the action in like circumstances.”³³⁰ Rule utilitarians argue that to achieve maximum happiness, there needs to be consistency in conduct, and this is achieved through the use of rules.³³¹ According to rule utilitarians, actions should be judged “by reference to the utility of the general performance of actions of their kind.”³³² If decisions are always left to individual calculations of utility, there will be no predictability or consistency. This will lead to substantial unhappiness.³³³ Instead, it is the use of rules for human conduct that is likely to maximise utility.³³⁴ The use of rules regulate society, and if we leave people constantly to make their own decisions based upon individual calculations of utility, it is likely to lead to chaos and absolute unhappiness.³³⁵ Rule utilitarians believe that following general rules restricts the possibilities of the chaotic results that act utilitarianism can produce. Barrow notes that:

...the world will be happier for having certain rules, what rules those should be determined by reference to human nature and the context of particular societies. One will certainly have to face further argument concerning what the rules should be, but hardly on the point that some rules are required.³³⁶

An example illustrating the key difference between act and rule utilitarianism is whether or not people should keep their promises.³³⁷ Rule utilitarians will argue that

³³⁰ Smart, *Utilitarianism: For and Against*, 9

³³¹ Barrow, *Utilitarianism: A Contemporary Statement*, 111

³³² Geoffrey Scarre, *Utilitarianism* (London: Routledge, 1996), 122

³³³ Barrow, *Utilitarianism: A Contemporary Statement*, 111

³³⁴ Sanford S. Levy, “Utilitarian Alternatives to Act Utilitarianism” *Pacific Philosophical Quarterly* 78 (1997): 97. Doi: 0031-5621/97/0100-0000

³³⁵ Barrow, *Utilitarianism: A Contemporary Statement*, 112

³³⁶ Barrow, *Utilitarianism: A Contemporary Statement*, 112

³³⁷ Scarre, *Utilitarianism*, 123

following the rule that one should not lie and should keep promises will maximise utility,³³⁸ for if no one could keep their promises and consistently lied then there would be no trust throughout the world.³³⁹ In contrast, Smart would argue that the guilt felt from lying or from not keeping promises is irrational and nothing but ‘rule worship.’³⁴⁰ Some act utilitarians would also argue that a blind following of these rules of conduct will leave people hostage to the will of liars and thieves.³⁴¹

The key difference between the two theories is evident – act utilitarianism is about individual calculations of utility, whilst rule utilitarianism uses general rules of conduct in order to maximise utility. However, there is a variation of rule utilitarianism that does take into account individual calculations of utility – conditional rule utilitarianism.

Conditional rule utilitarians argue that rules must always maximise utility.

Essentially, conditional rule utilitarianism is about following general rules, but acknowledging that one may need to modify an absolute rule in particular circumstances in order to take into account calculations of utility.³⁴² For example, there might be an absolute rule that says ‘tell the truth’ because truth telling is more likely than lying to maximise utility. However, if you have a friend who is a terrible artist, but has recently been depressed, telling them that their painting is bad (following the absolute rule of telling the truth) could lead the friend to suicide.³⁴³

So one may follow the rule: “tell the truth, except doing so may hurt someone’s

³³⁸ Barrow, *Utilitarianism: A Contemporary Statement*, 49

³³⁹ Barrow, *Utilitarianism: A Contemporary Statement*, 116

³⁴⁰ Landesman, “A Note on Act Utilitarianism”, 245

³⁴¹ Scarre, *Utilitarianism*, 124

³⁴² Scarre, *Utilitarianism*, 125

³⁴³ Scarre, *Utilitarianism*, 125

feelings, in which case you may tell a benevolent lie.”³⁴⁴ In other words, telling what in common sense would be known as a white lie does not contravene the absolute rule utilitarian principle that one should always tell the truth because truth telling maximises happiness.

What is crucial here to the torture debate is that act utilitarians believe that every action should be calculated and judged on its merits, and that there no place for rules within act utilitarianism when it comes to important decisions and situations. However, when the proponents argue that torture should be used in emergency situations, they stop with their discussion of utilitarianism with Bentham’s ‘greatest happiness of the greatest number’ principle. They claim to be using an act utilitarian calculus; however as the next section will show, they have misunderstood the principles of utilitarianism by framing their act utilitarian calculus with general rules.

5.3. Problems with the torture proponents use of utilitarianism

Bagaric and Clarke summarise their arguments for the use of torture as an interrogation technique in emergency situations with their utilitarian formula. The problem is that their formula is embedded within certain provisos or rules. For example, the authors note that:

³⁴⁴ Scarre, *Utilitarianism*, 125

1. “The only situation where torture is justifiable is where it is used as an information gathering technique to avert a grave risk.”³⁴⁵
2. “Torture should only be used as a last resort and hence should not be utilized (sic) where there is time to pursue other avenues of forestalling the harm.”³⁴⁶
3. As a general rule torture should normally be confined to people that are responsible in some way for the threatened harm.”³⁴⁷

What is important about the above quotations from Bagaric and Clarke is that they all have one crucial element in common – they are *rules*. What this means is that Bagaric and Clarke’s act utilitarian justification for torture in emergency situations is not act utilitarianism. An act utilitarian should not develop variables for a formulaic calculation of utility and then constrain that calculation of utility with absolute rules that trump the formula.³⁴⁸ They preference the calculation of utility over the use of rules, based upon the argument that it is only sentiment and culture that says that some things are always wrong. They argue that using calculations of utility will inevitably show that some actions that we consider to be morally abhorrent, such as murder, are not always wrong.³⁴⁹ Act utilitarianism is about weighing ‘goodness’ against ‘badness’ and making a decision on the individual merits of each situation.³⁵⁰ Bagaric and Clarke have attempted to do this, but in my view they have voided their own formula by framing their equation with general rules.

³⁴⁵ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 611

³⁴⁶ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 612

³⁴⁷ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 612

³⁴⁸ Landesman, “A Note on Act Utilitarianism”, 245

³⁴⁹ Barrow, *Utilitarianism: A Contemporary Statement*, 108

³⁵⁰ Barrow, *Utilitarianism: A Contemporary Statement*, 110

Barrow notes that if people are left to consistently calculate their own moral actions, then it could lead to situations where the results are catastrophic by ‘eliminating’ their enemies unjustly.³⁵¹ By looking at the formula proposed by Bagaric and Clarke, they seemingly have tried to avoid this by adding in rules of conduct that attempt to avoid calculations of utility that would lead to unnecessary torture. The proponents of torture should have acknowledged that they were using *conditional rule utilitarianism*, which says that “an act is right if, and only if, it conforms to a rule whose application always maximises utility.”³⁵² Conditional rule utilitarians allow the use of calculations of utility for individual actions within the structure of rules if that act will maximise utility. For example, while allowing one hostage to die to guarantee the safety of the other nineteen would break the prohibition against killing, calculating utility within this rule could maximise utility.³⁵³

Rule utilitarians will argue that if society conforms to a rule, then each individual should conform to that rule in order to maximise utility.³⁵⁴ However there are exceptions. For example there is the law and rule that motorists should not drive through red lights. However, there are exceptions for emergency vehicles. It would be hard to argue that it does not maximise utility for an ambulance to break the general rule that motorists should not drive through red lights. This is the advantage of conditional rule utilitarianism. Allowing for the breaking of rules in various situations where it will obviously maximise utility. But, Bagaric and Clarke did not do this. If they had have argued from the start that they were using a form of rule utilitarianism, it would have been a lot harder to critique their use of utilitarianism.

³⁵¹ Barrow, *Utilitarianism: A Contemporary Statement*, 112

³⁵² Scarre, *Utilitarianism*, 125

³⁵³ Scarre, *Utilitarianism*, 125

³⁵⁴ Scarre, *Utilitarianism*, 124

The fact that they are using an ‘act’ utilitarian calculus and added rules to it means that they have misapplied utilitarianism, so their formula is unjustifiable.

Therefore, Bagaric and Clarke’s formula is not act utilitarianism – it is a form of rule utilitarianism. I will now argue that rule utilitarians would not support torture in emergency situations. Dershowitz acknowledges that rule utilitarians would argue against the use of torture as an interrogational technique.³⁵⁵ Matthews notes that rule utilitarians argue that because of the importance of establishing “laws and institutions”³⁵⁶ (rules of conduct), torturing for the sake of trying to maximise utility will cause more harm than good.³⁵⁷

Rule utilitarians are more likely than act utilitarians to look to the long term for consequences of an action.³⁵⁸ They believe that in order to achieve the ideal society, there is a need to follow general rules of conduct³⁵⁹, and that the only way to achieve a majority of happiness throughout the world is to follow certain rules. Individual calculations of utility can be antithetical to consistency and predictability, and this has the ability to breed unhappiness.³⁶⁰

The key to utilitarianism in general is that morality can only be derived from the promotion of happiness.³⁶¹ For example, J.S. Mill believed that freedom was essential, but it is not a morally good concept within itself. Its moral quality is

³⁵⁵ Dershowitz, *Why Terrorism Works*, 145

³⁵⁶ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 105

³⁵⁷ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 105

³⁵⁸ Barrow, *Utilitarianism: A Contemporary Statement*, 115

³⁵⁹ Barrow, *Utilitarianism: A Contemporary Statement*, 111

³⁶⁰ Barrow, *Utilitarianism: A Contemporary Statement*, 117

³⁶¹ Barrow, *Utilitarianism: A Contemporary Statement*, 44

derived from its ability to maximise the general happiness of society.³⁶² Rule utilitarians are trying to find ideal happiness for society, and this means adopting rules of conduct.³⁶³ They are essentially trying to create an ideal moral code for society to follow using their concept of general rules.³⁶⁴ As I have shown in previous chapters, torturing can have seriously detrimental effects on society, so could torture be a part of an ideally happy society? Barrow notes that:

One rule which is indisputably a logical necessity is that one should always refrain from acts that cause gratuitous suffering to others. For, although the agent might derive satisfaction from such acts, and even maintain that it outweighs the unhappiness of others, it is self-evident that the ideal cannot be achieved this way.³⁶⁵

Justifying torture by arguing it will maximise utility will cause many long term problems in the institutions of a nation such as health care, military, policing and the legal system.³⁶⁶ If society made a rule that “the government/police can torture in emergency situations if it is guaranteed to maximise the utility of the majority”, would it work? As I have shown earlier, torture does not result in reliable information, so the torturer is relying on assumptions. Torture is likely to induce fear into the citizens upon which it is unleashed³⁶⁷, so is this maximising utility? History has shown that minorities are likely to be targeted (Jews, homosexuals)³⁶⁸ and that torturers will most likely have an inherent bias.³⁶⁹ Is this maximising utility? Can anyone guarantee that “pumping and dumping” (torture then murder)³⁷⁰ will not occur? If it does, would it maximise utility? Torture can and has been used to

³⁶² Barrow, *Utilitarianism: A Contemporary Statement*, 43

³⁶³ Barrow, *Utilitarianism: A Contemporary Statement*, 117

³⁶⁴ Emmons, “VI. – Act vs. Rule Utilitarianism”, 232

³⁶⁵ Barrow, *Utilitarianism: A Contemporary Statement*, 116

³⁶⁶ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 105

³⁶⁷ Hunsinger, “Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.”, 232

³⁶⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 73

³⁶⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 73

³⁷⁰ Card, “Ticking Bombs and Interrogation”, 5

break down and destroy the social relationships within a society.³⁷¹ These are just some of the arguments that I mentioned in the chapter entitled “Why the ticking bomb scenario is flawed.” There are many more, but what they illustrate is that making a rule that torture can be allowed if it will maximise the utility of the majority is flawed because there are too many variables that would need to be taken into account, which will most likely lead to the answer that it cannot maximise utility.

This does matter. Whether or not the torture proponents have used the ‘wrong’ form of utilitarianism is important because we are not dealing with emergency vehicles passing through red lights or whether one should fully stop at a stop sign every time. Dershowitz and Bagaric and Clarke are using utilitarianism to justify an act that many consider to be morally abhorrent – torture. This cannot be taken lightly, and if one is to try and justify its use, then they must get all of their empirical and philosophical arguments correct. In relation to the use of act utilitarianism, the proponents are not correct in their use.

5.4. Why utilitarians should not support torture

Calculation of benefits, pains and harms

One of the reasons that utilitarians should not support torture in emergency situations such as the ticking bomb scenario is the real problems with the act utilitarian calculation. Matthews notes that medical evidence suggests that

³⁷¹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 90

evaluating and calculating pain is an extremely difficult task.³⁷² Part of the problem is that pain is a different experience for every individual, and what one person might find unbearable, another will not find painful. This can be derived from someone's age, gender, culture, politics or their ability to cope with difficult situations.³⁷³ These problems with evaluating the minimum or maximum amount of pain that should be inflicted upon the torture victim can exacerbate the use of unnecessary torture, and Matthews argues that this can lead to unwarranted violence.³⁷⁴ Matthews argues that the concept of pain is far too complex to be a variable in a torture formula, and that there is no real way to measure the level of torture that would be good for the public good.³⁷⁵ He notes that torturers have no mathematical or scientific basis for measuring the minimum amount of pain that should be inflicted upon the victim.³⁷⁶

As I have argued in previous chapters, there is a myriad of differing harms related to the use of torture, but the benefits are dubious. Matthews notes that the effectiveness of torture has never been proven, that the harms are definite, and that the benefits are far from definite, so the calculus makes little sense.³⁷⁷ In his opinion, there are serious problems with torture calculi because the possible benefits are too probative, whereas the certain benefits are not given sufficient weight.³⁷⁸ He argues that:

³⁷² Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 110

³⁷³ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 110

³⁷⁴ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 111

³⁷⁵ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 112

³⁷⁶ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 112

³⁷⁷ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 113-4

³⁷⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 116

If we seriously accept that it is a bad method, we must also see that defenders are far too quick simply to conclude that it is still better than nothing at all. The wide ranging and inevitable harms more than outweigh the phantom possibilities that ticking-bomb cases and fears of catastrophe create.³⁷⁹

As I have noted in previous chapters, there are serious harms to the torturer and society that need to be taken into account when deciding whether to torture. The calculus must take into account the possibility of the torturer further brutalising a subject in order to justify what they are doing.³⁸⁰ Joseph noted how a torturer could take things further if they are not achieving results,³⁸¹ and torturers simply lose their emotion and dignity.³⁸² There is also the possibility that bad torturing could kill the victim or unite the enemy.³⁸³ The effect on society can be devastating, with a normalising effect of such abhorrent conduct³⁸⁴, and the amount of fear that can be spread among society.³⁸⁵ The effect on the victim, torturer and society that I explained in chapter two must be taken into account as one of the variables.

As I mentioned in the earlier chapter, there is a seriously detrimental effect of torture on society, and this is not taken into account by Bagaric and Clarke in their torture formula. An act utilitarian must weigh the benefits against the harms that the act will cause. There are serious problems with evaluating benefits, and there are serious harms that can be inflicted upon society if torture is allowed. Clearly, Bagaric and Clarke have not been able to do this sufficiently as there are serious problems with their calculus. There are too many possible harms, the benefits are

³⁷⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 115

³⁸⁰ Hunsinger, "Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.", 232

³⁸¹ Joseph, "Torture: The Fallacy of the Ticking Bomb", 152

³⁸² Wolfendale, "Training Torturers: A Critique of the "Ticking Bomb" Argument", 282

³⁸³ James, "Torture: What is it, Will it Work and Can it be Justified?", 157

³⁸⁴ Hunsinger, "Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.", 232

³⁸⁵ Hunsinger, "Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.", 232

far from probative and it is nearly impossible to quantify everything, so their formula is essentially nonsensical.

In the previous chapter I noted how if torturing in the ticking bomb scenario is to work effectively, there would need to be proper training of the torturer to extract information from the suspect in a short amount of time. Matthews argues that there would be a need to torture innocent subjects in order to test the torture techniques effectively in a situation that would be closer to ‘reality’.³⁸⁶ If the possibility of torturing the innocent to practice torture techniques became reality, then it would be impossible for the calculus to work. The calculus is dubious as it is, but adding a variable where the innocent are guaranteed to be tortured when they will not have any information because there is not even a potential threat, would surely show that the harms of torturing will far outweigh any possible benefit.

Imminence and time in the ticking bomb scenario

As I argued in chapter two, there are serious problems with evaluating time in the ticking bomb scenario. As the threat becomes more imminent, then it is less likely that torture will work³⁸⁷ and torture requires a lot of time to possibly work. Torture is not something that can just be applied because there is little time to gather the information.³⁸⁸ Imminence can lead to more or unnecessary torture being applied to the victim³⁸⁹ and it is generally accepted that there is always a better

³⁸⁶ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 124

³⁸⁷ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 74

³⁸⁸ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 75

³⁸⁹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 76

alternative to torturing for information.³⁹⁰ Problems with imminence and time pose a serious problem for the act utilitarian calculus as I will now demonstrate.

Bagaric and Clarke's act utilitarian calculus contains rules and is therefore not really an act utilitarian calculus, but if we use it as a basis to see what variables would need to be taken into account, we already have:

(1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information.³⁹¹

But in a more realistic situation, there need to be more variables taken into account. What about the effect on society that torture will have? Then there is the effect on the victim (especially if the victim is innocent). There can be damaging effects on the torturers, and there can be a real breakdown in social relationships within society.³⁹² Without taking into account the rules that they place around the formula, there is not a variable that considers whether torturing in the specific individual case has the probability of being effective. Then there is the political effect that torture can have. Matthews notes that torture is generally ineffective if it is not used solely as a "mass-interrogation technique", and if it does work the political cost is extremely high.³⁹³ A further consideration is the availability of torturers. Are there any highly skilled and highly trained torturers available, or are there only 'amateur torturers' or torture students? These 'amateur torturers' could kill the victim accidentally or worsen the situation by polarising the enemy.³⁹⁴

³⁹⁰ Card, "Ticking Bombs and Interrogation", 12

³⁹¹ Bagaric, "Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable," 611

³⁹² Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 90

³⁹³ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 89

³⁹⁴ James, "Torture: What is it, Will it Work and Can it be Justified?", 157

There is almost an endless range of factors that would need to be taken into account if anyone were to come up with a real and *possibly* effective act utilitarian calculus for the justification of torture in emergency situations. One could spend days, months, years trying to find a calculus that would work, but there is one variable in Bagaric and Clarke's original flawed calculus that trumps the formula – the immediacy of the harm. If the government was following a calculation with many variables, it is unlikely that there would be time to actually finish the formula in time to torture effectively. The less time there is, the less time torture is likely to be effective,³⁹⁵ so in the end, wouldn't it would be more effective to use proven, effective techniques.

5.5. Conclusion

The utilitarian argument is meant to be the proponents' strongest argument for the use of torture as an interrogation technique. However, it is their most flawed argument. Utilitarianism is not simply 'what is the greatest good?' If we are to try and formulate an act utilitarian calculus for an action, it is important to understand act utilitarianism is. It is not sufficient to cobble together a few variables and say that it is act utilitarianism. There are simply too many variables that would need to be taken into account if one were to try and justify torture using an act utilitarian calculus. In addition, there are too many demonstrated harms of torture, whilst the benefits are problematic, so it should be concluded that it would be better for

³⁹⁵ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 74

interrogators to concentrate on techniques that are effective, rather than trying to weigh up variables in a flawed act utilitarian calculus.

Chapter Six: Conclusion

Returning to the ticking bomb scenario where Dr. Pernicious has announced his plot to detonate a nuclear device somewhere in Perth, it is not unrealistic that some would accept the argument that torture should be used in such a situation. If Dr. Pernicious is captured and is refusing to provide the necessary information, proponents of torture might argue that it is an unpleasant reality to resort to torture in order to extract the necessary information from him.

Dershowitz and Bagaric and Clarke, as proponents of interrogational torture argue that torture may be a necessary evil in order to gain information from Dr. Pernicious or his associates that has the ability to save many innocent lives.³⁹⁶ Dershowitz believes that the possible torture in cases such as Dr. Pernicious should be legalised as it would bring ‘accountability’ to a system of torture which is currently operating ‘under the radar’.³⁹⁷ By legalising and regulating torture, Dershowitz argues that more dangerous forms of torture would be avoided,³⁹⁸ less torture would occur,³⁹⁹ and that this would lead to torture that *maximises* civil liberty.⁴⁰⁰

Bagaric and Clarke further this argument by arguing that torture should be considered morally permissible in certain situations.⁴⁰¹ Bagaric and Clarke argue

³⁹⁶ Dershowitz, *Why Terrorism Works*, 143

³⁹⁷ Dershowitz, *Why Terrorism Works*, 141

³⁹⁸ Dershowitz, *Why Terrorism Works*, 162

³⁹⁹ Dershowitz, *Why Terrorism Works*, 141

⁴⁰⁰ Dershowitz, *Why Terrorism Works*, 141

⁴⁰¹ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 583

that because of the inherent desire to avoid pain, torture can be effective.⁴⁰² They are clear that in cases where the torturer has absolute knowledge that the suspect has the requisite information, torture can be morally justified.⁴⁰³ They are absolutely sure that the use of torture will not be expanded because their position is that torture can only be used in the ticking bomb scenario.⁴⁰⁴ Bagaric and Clarke believe their formula that takes into account lives at risk, immediacy of harm, other (lack of) other interrogational means, the guilt of the suspect and whether the suspect has the information.⁴⁰⁵ In their view, their ‘torture formula’ is an excellent way to assess whether torture could be used in particular and unique circumstances.

However, torture scenarios are not reality, they are *fantasy*. It is extremely unlikely, legal or not, that torture will be restricted to use in the ticking bomb scenario as it is a tool. It is a tool that is used to humiliate. It is a technique used to highlight governmental power.⁴⁰⁶ Information gathered from torture is always problematic. Also, the experience of torture means that it is unlikely that the suspect will respond to other techniques after being tortured.⁴⁰⁷ Torture also has serious societal effects, with the victim being dehumanised,⁴⁰⁸ and in dehumanising the torture victim, the torturer themselves become dehumanised.⁴⁰⁹ These effects on the torturer and the suspect/victim form part of the serious effect of torture on society, where social

⁴⁰² Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 588

⁴⁰³ Bagaric, *Torture When the Unthinkable is morally permissible*, 54

⁴⁰⁴ Bagaric, *Torture When the Unthinkable is morally permissible*, 44

⁴⁰⁵ Bagaric, “Not Enough Official Torture in the World? The Circumstances in Which Torture is Morally Justifiable,” 611

⁴⁰⁶ Manderson, “Another Modest Proposal”, 647

⁴⁰⁷ Bretcher, *Torture and the Ticking Bomb*, 24

⁴⁰⁸ Hunsinger, “Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.”, 233

⁴⁰⁹ Hunsinger, “Torture Is the Ticking Time-Bomb: Why the Necessity Defense Fails.”, 232

relationships are broken down.⁴¹⁰ These arguments concerning social harm complement the argument that the assumptions in the ticking bomb scenario are seriously flawed. It is impossible to truly *know*⁴¹¹ whether not there is real threat, or just a potential threat,⁴¹² or whether Dr. Pernicious is just a hoaxer. There are serious doubts over whether torture could ever produce reliable information in such a short time frame.⁴¹³ Finally, the only reasonable conclusion is that it would be better in the end, to try to gain the trust of a suspect rather than brutalise them and essentially try and ‘beat’ the required information out of them.⁴¹⁴

Torture can be considered a “freestanding international crime.”⁴¹⁵ Government is enacted in order to protect the lives and liberty of the people.⁴¹⁶ Torture does not do this. Locke argued that the government cannot enslave or impoverish the people,⁴¹⁷ yet with its ability to target minorities,⁴¹⁸ torture is something that will impoverish and enslave. Governments use torture as a show of power⁴¹⁹ and it is likely that its widespread use will lead to cases of unnecessary torture.⁴²⁰ Torture is a violation of civil liberty and human rights, and it seems that the proponents of interrogational torture either ignore this or are prepared to sacrifice civil liberties in the interest of enhance ‘security.’

⁴¹⁰ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 90

⁴¹¹ Manderson, “Another Modest Proposal”, 646

⁴¹² Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 79

⁴¹³ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 74

⁴¹⁴ Card, “Ticking Bombs and Interrogation”, 12

⁴¹⁵ Ratner, *Accountability for Human Rights Atrocities in International Law*, 122

⁴¹⁶ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 57

⁴¹⁷ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 62

⁴¹⁸ Manderson, “Another Modest Proposal”, 647

⁴¹⁹ Manderson, “Another Modest Proposal”, 647

⁴²⁰ Manderson, “Another Modest Proposal”, 646

Finally, the utilitarian argument used by the proponents to justify interrogational torture in emergency situations is shallow and does not fully take into account the complexities of utilitarianism. Bagaric and Clarke's formula is effectively an act utilitarian calculation where they are effectively exploring the precepts of act utilitarianism. However, it is not act utilitarianism because there are general rules that will void their calculation. They have espoused a form of rule utilitarianism. It is unlikely that rule utilitarians would support the use of interrogational torture – even in emergency situations. In addition, even if one were to create a legitimate act utilitarian calculus for the use of torture as an interrogation technique, evaluating pleasure and pain are so difficult⁴²¹ that their arguments are flawed and nonsensical.

6.1. Why the utilitarian argument is imperative

I argued in chapter four that torture is the absolute violation of human rights, especially the liberty of all citizens of a democracy. In the Lockean sense torture violates liberty as no governmental action should impoverish or enslave⁴²² and the government must act in the best interests of its citizens.⁴²³ Briefly, if the government violates these principles, they will be in a state of war with their citizens and gives the right of each and every citizen to revolt against the government.⁴²⁴ However, this argument concerning liberty can be taken further by simply opening the page of an undergraduate politics textbook. In Andrew Heywood's *Politics*, liberal democracy is defined as:

⁴²¹ Matthews, *An Absolute Violation: Why Torture Must be Prohibited*, 110

⁴²² Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 62

⁴²³ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 63

⁴²⁴ Locke, *The Second Treatise of Government and a Letter Concerning Toleration*, 92

...a form of democratic rule that balances the principle of limited government against the ideal of popular consent. Its 'liberal' features are reflected in a network of internal and external checks on government that are designed to guarantee liberty and afford citizens *protection from the state* (emphasis added). Its 'democratic' character is...conducted on the basis of universal suffrage and political equality.⁴²⁵

The most important aspects of that definition are that the rights that we are afforded in a liberal democracy are based upon the need for protection 'from' the state, the guarantee of liberty and political equality. Chapter three, four and five of my thesis argue that torture will not offer protection for the people. The reason for this include its lack of effectiveness, the effect it has on society, the victim and the torturer and the many problems related to the ticking bomb scenario itself. However, my principal focus was the torture proponents' misapplication of act utilitarianism, which must be related to torture as a violation of liberty.

Bagaric and Clarke argued that their torture formula should be applied when deciding whether torture should be used in emergency situations. However, as I argued in chapter five, they misapplied act utilitarianism by including rules within their act utilitarian calculus. This voids their calculus. This is important because they have theoretically misapplied utilitarianism, and base a violation a serious violation of liberty upon a misapplication of utilitarianism. This is why my arguments dealing with the differing forms of utilitarianism are not mere semantics. They do matter.

Here, we are not dealing with rules or calculations of utility that are relatively trivial matters; such as whether one should brush their teeth regularly or indicate around a roundabout at 5am when there are no other cars on the road. Torture is not a trivial

⁴²⁵ Andrew Heywood, *Politics*, 2nd ed (New York: Palgrave MacMillan, 2002), 30

matter. Torture does not offer protection from the state. Liberal democracy is based upon protection from the excesses of the state, yet torture does the opposite – Torture dehumanises⁴²⁶ and highlights the ultimate power of the government *over the people*.⁴²⁷ Torture will not lead to political equality in any sense, because it is likely to target various minority groups.⁴²⁸ Torture damages the identity of the victim. Manderson notes:

Torture is rape just as rape is torture. It is not something to shrug off or even, most of the time, to get over.⁴²⁹

Torture is an absolute violation of liberty. Such a violation of liberty cannot be ignored lightly, so Bagaric and Clarke needed to justify their support of interrogational torture with a better researched and more effective torture formula; they did not do this. If one is to argue that something such as torture can be morally justified, as Bagaric and Clarke have tried to do, their arguments must be valid. The torture proponents have not successfully used utilitarianism to justify their position on interrogational torture; therefore there can be no justification for such a serious violation of liberty.

6.2. It is important to keep the torture critique relevant

Whether or not there is torture occurring somewhere in the world right now is irrelevant to whether or not we should continue to debate the morality of its use. Even if torture had been eliminated at this point in time, history has shown that it

⁴²⁶ Joseph, “Torture: The Fallacy of the Ticking Bomb”, 150

⁴²⁷ Manderson, “Another Modest Proposal”, 647

⁴²⁸ Manderson, “Another Modest Proposal”, 647

⁴²⁹ Manderson, “Another Modest Proposal”, 647

will be used again. Legalised torture was used in seventeenth century England,⁴³⁰ but we do not want return to the seventeenth century. Torture warrants in the sixteenth and seventeenth century would generally prescribe the kind of torture that was to be applied to the suspect; usually the ‘rack’ or ‘manacles’.⁴³¹ The manacles worked by “suspending the victim by his hands without foot support.”⁴³² It was generally accepted that these were the two forms of torture that were to be used upon the suspect, but studies show that warrants could be ignored in favour of other ‘more effective’ techniques.⁴³³ Langbein notes that one victim was left to the rats in the dungeon, and two others were put in a room so small that they could neither stand nor move.⁴³⁴ Another method was the ‘Skevingtons Iron’ that involved compressing the body of the suspect.⁴³⁵

Briefly examining the type of torture allowed by the torture warrants in the past brings two important points into focus. The first is that, in the twenty-first century, do we really want such behaviour sanctioned by the government? Despite the fact that the torture proponents believe that there should be medically supervised torture,⁴³⁶ these methods are realistic enough that they could be used under medical supervision. This intertwines with the second point, that history has shown that the use of torture will most likely be used outside of the ‘legal limit.’ The torture warrants were only supposed to include the two differing types of torture, yet there are examples of people being sent to the dungeon to deal with the rats. Whilst it is

⁴³⁰ James, “Torture: What is it, Will it Work and Can it be Justified?”, 159

⁴³¹ John H. Langbein, *Torture and the Law of Proof* (Chicago: The University of Chicago Press, 1976), 84

⁴³² Langbein, *Torture and the Law of Proof*, 84

⁴³³ Langbein, *Torture and the Law of Proof*, 85

⁴³⁴ Langbein, *Torture and the Law of Proof*, 85

⁴³⁵ Langbein, *Torture and the Law of Proof*, 85

⁴³⁶ Bagaric, *Torture When the Unthinkable is morally permissible*, 62

unlikely that this would happen in the present, it is an example that shows there is always the potential for the expansion of torture. This directly affects the public safety and the integrity of democracy. This example of the slippery slope argument shows that it is not unrealistic that children or the innocent could be tortured.

6.3. To Conclude

It is important to keep an open mind and not completely dismiss the torture proponents' arguments just because they are morally questionable. The arguments for the use of interrogational torture in emergency situations are superficially convincing, so it is important to continually research in the area and make sure that all arguments are theoretically and empirically sound, otherwise we could end up in a situation where the innocent have the most heinous of acts inflicted upon them in the name of 'protection.'

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